

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF &  
APPENDIX**





75-1309

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P/S

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

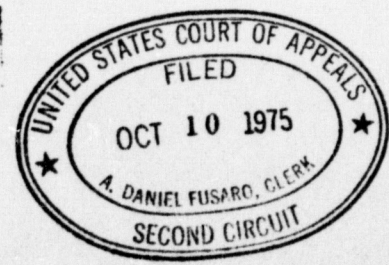
- against -

GEORGE GALGANO and VICTOR LEO  
a/k/a VICTOR BIANCO,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF AND APPENDIX FOR  
APPELLANT, VICTOR LEO



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

DOCKET NO. 75-1309

- against -

GEORGE GALGANO and VICTOR LEO  
a/k/a VICTOR BIANCO,

Appellants.

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BRIEF OF APPELLANT, VICTOR LEO

PRELIMINARY STATEMENT

Appellant, VICTOR LEO, appeals from a judgment of the United States District Court for the Southern District of New York, rendered August 4, 1975, convicting him of participation in the use of extortionate means to collect and attempt to collect extensions of credit in violation of 18 U.S.C. sections 891 and 894 and sentencing him to five years in prison, of which four and one-half years were suspended and probation for that period directed by the Court. He was acquitted on Count Two of the same indictment charging him with carrying a firearm during the commission of a felony under 18 U.S.C. sections 921 and 924.

This action was tried to a jury on June 4, 5, 6, 9, 10,



11, 12, 13, 16, 17 and 18, 1975, before HON. MORRIS LASKER. The Trial Court admitted the appellant to the original bail pending appeal. A notice of appeal was filed on August 11, 1975.



THE FACTS OF THE CASE

The first witness for the Government was BRUNO ZAFFINO, one of the complaining witnesses named in the indictment. At the outset of his testimony, objection was made by defense counsel concerning conversations held by this witness or any witness with one DAVID GRANDE who was not named in the indictment in any way whatsoever. The Court sustained their objection however, these events are mentioned because this Court must be mindful of the "presence" of DAVID GRANDE throughout the trial. Although there was insufficient evidence against the appellant that he knowingly participated in these transactions, the Government sought to include the appellant with MR. GRANDE in the hope of convincing the jury of his guilt.

MR. ZAFFINO testified to meeting the appellant in White Plains for the first time with MR. FLORENZE DeRAFFAELE. Thereafter the appellant drove with MR. DeRAFFAELE, one of the other complaining witnesses, to the Halstead Inn in Harrison, New York. There a gun was allegedly pointed at him, not by the appellant, but by MR. GRANDE. There is no testimony as to the appellant's conduct at that time. MR. ZAFFINO then testified about the "fire" to his truck which destroyed a tire. However, there is no direct evidence against the appellant concerning his connection with it.

In fact, the Fire Marshal of New Rochelle and his records do not mention anything "suspicious" about this fire. MR. ZAFFINO then went on to relate "threatening" telephone calls to him, the majority of which were allegedly made by MR. GRANDE.

MR. ZAFFINO then testified about sudden daily visits by MR. GRANDE and MR. LEO in which they would allegedly throw open the doors of his car and demand the payment of money from him. However, the conversation is solely with MR. GRANDE and not MR. LEO.

MR. ZAFFINO testified about payments of cash to both appellants and MR. GRANDE after the bank account of G. ZAFFINO & SONS, INC., was levied upon by the Sheriff of Westchester County. That testimony was rebutted by a representative of the Sheriff's office as will be discussed later. Suffice it to say that no money was paid to the appellant.

On cross-examination, MR. ZAFFINO divided the repayment of monies as shown by checks introduced into evidence by the Government. [Numerals in parenthesis refer to the official court reporter's minutes of the hearing and trial unless otherwise indicated]. (208-218). The sum of \$9,910.00 (one check for \$5,000.00 and one for \$4,910.00) was paid allegedly through threats of appellant however, the sum of \$13,000.00 was paid pursuant to a default judgment, never vacated by MR. ZAFFINO, entered against



G. ZAFFINO & SONS, INC., by the appellant, GEORGE GALGANO. The facts herein presented are not those usually encountered under the penal statutes herein involved. There is no loan-sharking or extortionate credit transactions, only extortionate means alleged as the offense. However, the "means" to collect the sum of \$13,000.00 some-odd was perfectly legal and not extortionate. The Government in its opening denied the legal means. As a result, the jury became confused by MR. ZAFFINO'S testimony. In fact, it appears that the jury felt that all the payments emanated from one legal obligation owed by MR. ZAFFINO to the appellant, GEORGE GALGANO, viz., the mortgage. The Court's cautionary instruction sought to set the matter in perspective however, the confusion remained (215). The payments by MR. ZAFFINO'S brothers coincided with those made to their sister viz., \$9,910.00.

In further cross-examination of MR. ZAFFINO (289-90), he admitted that after the last payment he was no longer afraid. This testimony is contradictory of that testimony given by him on direct examination concerned with having to appear by subpoena during the investigating period and even at trial. (79-80). As far as he was concerned the matter involved a legal obligation which was satisfied however, after the lapse of almost five years, he felt threatened. No report was ever made by him to the autho-

rities and payment was made pursuant to the judgment and not threats.

As further indication of this witness' lack of fear of the events at the Halstead Inn, he testified, on cross examination, that he did nothing in relation to helping his nephew, assuming the latter was in any danger at that time (312-3).

MR. FLORENCE DeRAFFAELE then testified to meeting MR. LEO in White Plains in July 1970 and driving with him to the Halstead Inn in Harrison, New York (377). He stated that he did "not recall where he [LEO] was at that particular moment" [when MR. GRANDE spoke with MR. ZAFFINO]. He was not concerned with his presence or whereabouts. (382). This witness testified that no threats were made by MR. LEO, or did he feel threatened by him.

MR. DeRAFFAELE then testified to what he had heard from other persons concerning the reputation of MR. GRANDE (386-90).

MR. DeRAFFAELE then went on to testify to the entry of his friend, LARRY PERRONE, into The Halstead Inn and about a subsequent meeting in the kitchen of that restaurant in which MR. GRANDE took out a gun. (394). He was uncertain about the appellant's presence in the kitchen at that time (395).

On cross-examination, MR. DeRAFFAELE admitted that the only words stated by MR. LEO were "I am taking you there to



discuss the money that is due". (428). He further stated that he had assumed that the appellant had purchased certain notes from the appellant GALGANO (428), however, no such monies were mentioned (429).

Finally, MR. DeRAFFAELE admits that he was not afraid of the appellant and that he did not threaten his life in any way. (445). Furthermore, although he was alone with one LOUIS RUGGIERO in a liquor store on the day that he was "held" in the Halstead Inn, the witness testified that he never told MR. RUGGIERO why he needed \$5,000.00 and did not ask him for help or the use of his telephone. (449-452). This witness testified that he spoke with MR. LEO in 1972 about renting the back of the appellant's then store premises. He also saw the appellant in 1973 and 1974. He stated that the appellant never threatened him. (492-493 & 511). However, it was MR. LEO'S "association" with MR. GRANDE that caused him to be afraid of appellant. (506). MR. DeRAFFAELE was uncertain, except for MR. GRANDE, as to who was in the kitchen of the Halstead Inn that day (511).

MRS. CLEMENTINE DeRAFFAELE then testified to meeting MR. LEO, MR. GALGANO and MR. LEO at her home and delivering checks thereafter. No threats or menacing gestures of any kind were made by MR. LEO. (543-544). She then testified that she received

numerous telephone calls from persons she could not identify. (547-8). She, like MR. DeRAFFAELE, did not take any notice of MR. LEO; her attention was on MR. GRANDE (611). MRS. DeRAFFAELE testified that MR. LEO complained about a sore shoulder when he was in her house and that he did not threaten her (627-629). She stated that she was frightened of MR. LEO because of what she heard had allegedly occurred at the Halstead Inn however, no threats against her were made by the appellant.

The Government then placed LARRY PERRONE and RICHARD DONAHUE on the stand to testify. We prefer to deal with their testimony in our discussion of pre-indictment delay, *infra*.

We have dealt mainly with the testimony of the three complaining witnesses in the case because their testimony is the nub of the Government's proof.



### THE DEFENSE

The appellant's defense consisted mainly in his testimony and that of Deputy Sheriff Olmstead.

The appellant testified that in July, 1970, he was employed as a salesman for an electronics firm. He knew DAVID GRANDE and GEORGE GALGANO at that time. He was asked by DAVID GRANDE to meet FLORENZE DeRAFFAELE, GEORGE GALGANO, and BRUNO ZAFFINO in White Plains, New York one morning. At that meeting, GEORGE GALGANO asked him to drive with MR. DeRAFFAELE to the Halstead Inn in Harrison, New York. At the Halstead Inn, he introduced DAVID GRANDE to FLORENZE DeRAFFAELE and sits down with the latter for lunch. He never saw either LARRY PERONE or RICHARD DONAHUE in the Halstead Inn that day. A little while later he drives with MR. DeRAFFAELE to White Plains and is informed by MR. DeRAFFAELE that he is going to try to borrow \$5,000.00 from LOUIS RUGGIERO. Thereafter, MR. RUGGIERO, so MR. LEO is informed by MR. DeRAFFAELE, refuses the loan and the two then drive back to the Halstead Inn. Soon after their second arrival, the appellant leaves to call upon some customers.

The appellant testified that he then meets CLEMENTINE DeRAFFAELE at her home with MR. GRANDE and MR. GALGANO. FLORENZE DeRAFFAELE is also present in the home. At the time MR. LEO and

MR. GRANDE are on their way into New York City however, MR. LEO is informed by MR. GRANDE that the latter has to make a stop on business at MRS. DeRAFFAELE'S home. MR. LEO does not participate in the discussion at all and aside from small talk with both DeRAFFAELES, is silent at that time.

The appellant denies ever threatening any of the complaining witnesses, firing a gun at BRUNO ZAFFINO or of making any telephone calls to MRS. DeRAFFAELE or BRUNO ZAFFINO.

Deputy Sheriff OLMSTEAD testified that \$6,347.13 was paid by G. ZAFFINO & SONS, INC., to his office pursuant to a judgment obtained by GALGANO REALTY CORP., and a subsequent levy on their bank account. The appellant's Exhibits, "W", "X" and "Y" are annexed to the appendix in order to show this Court that BRUNO ZAFFINO was incorrect when he stated that he paid the appellants cash of \$6,347.13 to finally satisfy his obligations to MR. GALGANO. Furthermore, defendant LEO Exhibit "P", the entry in the cash disbursements ledger, shows that the check, although marked for cash, was really for the Sheriff of Westchester (1972).

It is obvious that the check was cashed, by BRUNO ZAFFINO and then turned into the Bank in return for a cashier's check which eventually was delivered to the Sheriff.



POINT I

THE PRE-INDICTMENT DELAY WAS  
UNNECESSARY AND INEXPLICABLE.  
SUCH DELAY WAS ACTUALLY PRE-  
JUDICIAL TO THE APPELLANT AND  
WAS TANTAMOUNT TO DELIBERATE  
CONDUCT ON THE PART OF THE  
GOVERNMENT.

The rule of law is basic. The Sixth Amendment has been held inapplicable to "pre-accusation delays". *United States vs. Marion*, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1972). It was also indicated in that case that the statute of limitations is the primary safeguard against the bringing of overly stale criminal charges. However, through a demonstration of "actual prejudice", dismissal of the indictment might occur by application of the Fifth Amendment. 404 U.S. at 324.

This Circuit has required "a defendant to make a particularized showing either that a key defense witness or valuable evidence has been lost during the delay, or that the defendant is unable to reconstruct the events surrounding the alleged offense. *United States vs. Feinberg*, 383 F. 2d 60, 65 (2d Cir. 1967), cert. denied, 389 U.S. 1044, 88 S. Ct. 788, 19 L.Ed. 2d 836 (1968)". *United States v. Dornau*, (S.D.N.Y., 1973), 356 F. Supp 1091). See *United States vs DeMasi* (2d Cir. 1971) 445 F. 2d 251. However, in *Feinberg*, this Circuit stated:

"Though prejudice is not to be presumed, it may well be that pre-arrest delay may impair the capacity of the accused to prepare his defense, and, if so, such impairment may raise a due process claim under the Fifth Amendment....a Sixth Amendment claim based upon the speedy trial guarantee.....For this reason we must inquire whether there is a plausible claim of prejudice resulting from the delay in arrest. Such a claim may arise if a key defense witness or valuable evidence is lost.....if the defendant is unable credibly to reconstruct the events of the day of the offense.....if the personal recollections of the government or defense witnesses are impaired.....because if any of these events occur the reliability of the proceedings for the purpose of determining guilt becomes suspect".

It is appellant's position that the cumulative effect of the delay caused him actual prejudice and that the carelessness and recklessness of the Government in permitting this delay amounted to deliberate conduct.

A broader view of the issue is found in the concurring opinion in *Marion* of Mr. Justice Douglas. The decision was 4-3 since only seven Justices considered the appeal.

Firstly, however, looking at the majority opinion, we see that MR. JUSTICE WHITE felt inclined to favor the notion that the framers of the Sixth Amendment did not intend to protect against pre-indictment delay by its enactment. 404 U.S. 315, note #6. The basis of the majority view was set forth, at P. 399:



"It is apparent also that very little support for appellees' position emerges from a consideration of the purpose of the Sixth Amendment's speedy trial provision, a guarantee that this Court has termed "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." United States v. Ewell, 383 US 116, 120, 15 L.Ed. 2d 627, 86 S. Ct. 773 (1966); see also Klopfer v. North Carolina, 386 US 213, 221-226, 18 L.Ed. 2d 1, 6-10, 87 S. Ct. 988 (1967); Dickey v. Florida, 398 US 30, 37-38, 26 L.Ed. 2d 26, 31, 32, 90 S. Ct. 1564 (1970). Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from factual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in Klopfer v. North Carolina, supra; see also Smith v. Hooey, 393 US 374, 377-378, 21 L. Ed. 2d 607, 610, 611, 89 S. Ct. 575 (1969). So viewed, it is readily understandable that it is either

a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment".

Mr. Justice White then stated:

"The law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in *United States v. Ewell*, supra, at 122, 15 L. Ed. 2d 632 "the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges". Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they "are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defence." *Public Schools v. Walker*, 9 Wall 282, 288, 19 L. Ed. 576, 578 (1870). These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced. As this Court observed in *Toussie v. United States*, 397 US 112, 114-115, 25 L. Ed. 2d 156, 161, 90 S. Ct. 858 (1970): "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have



become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. There is thus no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function."

It can be argued that a true bill dated merely five months prior to the expiration of the period of limitation comes within the spirit of this statement especially when the nature of the inordinate delay shall be hereinafter developed.

The Marion case concerned itself with mail fraud, wire fraud and transporting falsely made securities in interstate commerce. The public was allegedly defrauded in that case. Its scope is much broader than the case sub judice, which fact should be kept in perspective. In discussing the constitutional proportions of pre-indictment delay, it was stated in the concurring opinion, as follows:

"The Sixth Amendment, to be sure, states that "the accused shall enjoy the right to a speedy and public trial". But the words "the accused", as I understand them in their Sixth Amendment setting, mean only the person who has standing to complain of prosecutorial delay in seeking

an indictment or filing an information. The right to a speedy trial is the right to be brought to trial speedily which would seem to be as relevant to pre-indictment delays. Much is made of the history of the Sixth Amendment as indicating that the speedy trial guarantee had no application to pre-prosecution delays.

There are two answers to that proposition. First, British courts historically did consider delay as a condition to issuance of an information.

Lord Mansfield held in *Rex v. Robinson*, 1 Black W. 541, 542, 96 Eng. Rep. 313 (KB 1765), that subject to time limitations: "If delayed, the delay must be reasonably accounted for." In *Regina v. Hext*, 4 Jurist 339 (QB 1840), an information was refused where a whole term of court had passed since the alleged assault took place. Accord: *Rec v. Marshall*, 13 East 322, 104 Eng Rep 394 (KB 1811).

Baron Alderson said in *Regina v. Robins*, 1 Cox's CC 114 (Somerset Winter Assizes 1844), where there was a two-year delay in making a charge of bestiality:

"It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust



to put him on his trial".

Second, and more basically, the 18th century criminal prosecution at the common law was in general commenced in a completely different way from that with which we are familiar today. By the common law of England which was brought to the American colonies, the ordinary criminal prosecution was conducted by a private prosecutor, in the name of the King. In case the victim of the crime or someone interested came forward to prosecute, he retained his own counsel and had charge of the case as in the usual civil proceeding. See G. Dession, Criminal Law, Administration and Public Order 356 (1948). Procedurally, the criminal prosecution was commenced by the filing of a lawsuit, and thereafter the filing of an application for criminal prosecution or rule nisi or similar procedure calling for the defendant to show cause why he should not be imprisoned. The English common law, with which the Framers were familiar, conceived of a criminal prosecution as being commenced prior to indictment. Thus in that setting the individual charged as the defendant in a criminal proceeding could and would be an "accused" prior to formal indictment".

The same disadvantages attach<sup>to</sup>/pre-indictment as well as to post-indictment delay. The concurring opinion goes on:

"At least some of these values served by the right to a speedy trial are not unique to any particular stage of the criminal proceeding. See Note, 43 NYUL Rev. 722, 725-726 (1968); Note, 77 Yale LJ 767, 780-783 (1968); Comment, 11 Ariz. L. Rev. 770, 774-776 (1969). Undue delay may be as offensive to the right to a speedy trial

before as after an indictment or information. The anxiety and concern attendant on public accusation may weigh more heavily upon an individual who has not yet been formally indicted or arrested for, to him, exoneration by a jury of his peers may be only a vague possibility lurking in the distant future. Indeed, the protection underlying the right to a speedy trial may be denied when a citizen is damned by clandestine innuendo and never given the chance promptly to defend himself in a Court of law. Those who are accused of crime but never tried may lose their jobs or their positions of responsibility, or become outcasts in their communities.

The impairment of the ability to defend oneself may become acute because of delays in the pre-indictment stage. Those delays may result in the loss of alibi witnesses, the destruction of material evidence, and the blurring of memories. At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his."

The duty of the Government was then analyzed, as follows:

"The duty which the Sixth Amendment places on Government officials to proceed expeditiously with criminal prosecutions would have little meaning if those officials could determine when that duty was to commence. To be sure, "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." *Beavers v. Haubert*, 198 US



77, 87, 49 L Ed. 950, 954, 25 S. Ct. 573 (1905). But it is precisely because this right is relative that we should draw the line so as not to condone illegitimate delays whether at the pre- or the post-indictment stage".

Mr. Justice Douglas adopted the analogy of the famous Miranda case when he developed the following discussion:

"Our decisions do not support the limitations of the right to a speedy trial adopted in the majority's conclusion that "the [Sixth] amendment [does not extend] to the period prior to arrest". Ante, at 321, 30 L Ed 2d at 479. In Miranda v. Arizona, 384 US 436, 444, 16 L Ed 2d 694, 706, 86 S Ct. 1602, 10 ALR 3d 974 (1966), we held that it was necessary for the police to advise of the right to counsel in the pre-indictment situation where "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way". That case, like the present one, dealt with one of the rights enumerated in the Sixth Amendment to which an "accused" was entitled. We were not then concerned with whether an "arrest" or an "indictment" was necessary for a person to be an "accused" and thus entitled to Sixth Amendment protections. We looked instead to the nature of the event and its effect on the rights involved. We applied the Miranda rule even though there was no "arrest," but only an examination of the suspect while he was in his bed at his boarding house, the presence of the officers making him "in custody". Orozco v. Texas, 394 US 324, 327, 22 L Ed 2d 311, 315, 89 S. Ct. 1095. We should follow the same approach here and hold that the right

to a speedy trial is denied if there were years of unexplained and inexcusable pre-indictment delay.

Dickey v. Florida, supra, similarly demonstrates the wisdom of avoiding today's mechanical approach to the application of basic constitutional guarantees. While the Petitioner remained in federal custody, but the State did not seek to prosecute him until September 1, 1967, when he moved to dismiss the detainer warrant which had been lodged against him. An information was then filed on December 15, 1967, and petitioner was tried on February 13, 1968. Although the trial took place less than two months after the filing of the information, we held that there had been a denial of the right to a speedy trial because of the delay of more than seven years between the crime and the information.

In a concurring opinion, Mr. Justice Brennan discussed the broader questions raised by that case:

"When is governmental delay reasonable? Clearly a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive' is unjustifiable . . . The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be



whether it might reasonably have been avoided - whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of the reason for the delay and on trial safeguard. For a trivial objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interest of realizing an important objective, would be suspect". 398 US, at 51-52, 26 L Ed. 2d. at 40.

It must be remembered that the motion to dismiss the indictment on the grounds of pre-indictment delay was based, inter-alia, upon the supervisory function of the Court. In the words of JUDGE TENNEY, in United States vs. Blauner, 337 F. Supp. 1383 (S.D.N.Y., 1971):

"The statute of limitations is not "the sole constitutional measure of permissible Sixth Amendment [pre-indictment] delay", United States v. Colitto, 319 F. Supp. at 1083. The Government may not blissfully defer prosecution during the limitations period, Hodges v. United States, 408 F. 2d 543, 550 (8th Cir. 1969), since a prejudicial or deliberate delay occurring within the statutory period may deprive a defendant of his constitutional right to a speedy trial. United States v. Colitto, 319 F. Supp. at 1084; United States v. Coppola, 296 F. Supp. 903, 905 (D. Conn. 1969). Only recently the Court of Appeals for the Second Circuit noted that even within the limitations period, a delay may approach constitutional proportions if the accused's capacity to prepare his defense is impaired. United States v. DeMasi, supra. 445 F.2d 251".

An interesting discussion is found in 44 Temple Law Quarterly pp. 315-318.

"The Supreme Court has continued to hold that prejudice is an element of the right to a speedy trial. Thus prejudice must be proved and there are two possible methods by which this can be accomplished. First, the courts can continue to assume that there is no prejudice unless the defendant proves that he has been adversely affected by the delay. Second, the court can create a rebuttable presumption of prejudice and require the prosecution to overcome the presumption. Furthermore, although the Supreme Court has indicated that prejudice is a necessary element in determining a denial of the right to a speedy trial, it is not inconceivable that the Court might abolish that element at some time in the future. Consequently, a third alternative should be considered in which the Court conclusively presumes prejudice in the event of an unreasonable delay. Thus an unreasonable delay would be, without more, a denial of the accused's right to a speedy trial.<sup>42</sup>

The first alternative, requiring the defendant to prove prejudice in the event of an unreasonable delay, is the majority view. Although this method insures that persons not prejudiced will be brought to trial, it is disadvantageous in that the difficulty of proof may result in the conviction of persons who were prejudiced. Thus their constitutional right would be diluted. The defendant's "failure of memory and his inability to reconstruct what he did not remember virtually preclude[s] his showing in what respects his defense might have been more successful if the delay had been shortened".<sup>43</sup> In addition, confinement may



preclude careful investigation by the accused, causing the case to become stale and vague.<sup>44</sup> How can a defendant show that he failed to discover the existence of an unknown witness which he might have discovered had he been able to conduct a prompt, thorough investigation? How does he show that a witness's memory has faded? These problems may result in the defendant not being able to prove prejudice which exists".

"The problem is that of weighing the rights of accused persons against the right of society to have its criminals prosecuted. Although Ewell method will sufficiently protect the rights of society, it may result in the trial of persons whose constitutional rights have been abridged".

"The preferable alternative would appear to be to give a rebuttable presumption of prejudice to the defendant. The only disadvantage inherent in this method is that in certain cases the difficulty of overcoming the presumption may force the government to discontinue prosecution. However, the other factors to be discussed would seem to outweigh this possible disadvantage. As noted earlier, only purposeful, deliberate, or negligent delays on the part of the government are considered unreasonable. Therefore, the delay being the fault of the govern-

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42. United States v. Lustman, 258 F.2d 475 (2d Cir. 1958).

43. Ross v. United States, 349 F.2d 210, 215 (D.C. Cir. 1965).

44. Smith v. Hooey, 393 U.S. at 379.

ment, one's notion of basic fairness would compel proof by the wrongdoer that the accused had not been adversely affected. Admittedly, the difficulty of proof discussed above will place an additional burden on the government. However, the superior investigative machinery available to the prosecution will enable efficient management of the burden; the accused is not favored by a similar advantage. An analogy can also be made to the constitutional harmless-error doctrine which provides that when there is error that error is presumed to be prejudicial, and the party contending that it is harmless bears the burden of proving that it is harmless or foregoing the erroneous judgment."

"In summary, it would appear that the most preferable rule to determine whether the accused has been prejudiced, and consequently denied his right to a speedy trial, is to require the prosecution to rebut the presumption of prejudice. Not only has this method been incorporated into other areas of constitutional law by the constitutional harmless-error doctrine, but it places the burden in the hands of those most capable of carrying it, and also supplies a motivational remedy to the accused. There can be no question that the courts have a duty to clearly define the scope of the Sixth Amendment right. In doing so the courts should formulate and adopt a procedure which insures the greatest degree of fairness to both the accused and society. Thus, on the next opportunity for this question to be reviewed by an appellate court, there would seem to be no insurmountable obstacle to considering this question and creating a rebuttable presumption of prejudice in favor of the defendant.



At a minimum the issue should be re-examined on its merits".

Of course, the material contained in the foregoing discussion antedated Marion however, it is encompassed in the concurring opinion of MR. JUSTICE DOUGLAS.

We shall now consider the following points as proof of actual prejudice - caused by unnecessary pre-indictment delay"

- (a) the testimony of three Assistant U. S. Attorneys at the evidentiary hearing;
- (b) the testimony of LARRY PERONE and RICHARD DONAHUE.

It is apparent from the testimony adduced at the evidentiary hearing of May 13, and May 14, 1975, that the quality and quantity of the proof against the appellant never changed from January 1972 to February 1975.

AUSA SAGOR had the matter from January 1972 to March 1973. He testified that the case could not be presented to the Grand Jury because it contained "too much hearsay". (17). However, the investigation began in November, 1971, with interviews between the alleged victim witnesses and the F.B.I. These interviews were recorded in F.B.I. Form 302. MR. SAGOR felt that proper identification should be elicited of the appellant although photographs were shown to MR. ZAFFINO in November 1971 (48). The state of the file never changed during MR. SAGOR'S administration.

He felt the case involved extortionate credit transactions as did the F.B.I. and the other United States Attorneys after MR. SAGOR. This fact is revealing because what started out as loan-sharking and force ended up as legal debts and legal means to collect the same. MR. SAGOR admitted to having a vagueness about the matter. (49). In fact, his entire testimony shows that very little was added to the file from January 1972 to March 1973.

Then PETER TRUEBNER had the file of this matter from March 1973 to July 1, 1974. He interviewed BRUNO ZAFFINO in the summer of 1973. He was not happy with the details of the matter and the memory of MR. ZAFFINO and MR. DeRAFFAELE, the latter because of his illness (67). In September, 1973, the appellant is in touch with him. (67). At the same time the records of MR. WARREN SILBERKLEIT, the attorney for MR. ZAFFINO are sought by MR. TRUEBNER. The Government thus had from September 1973 to February 1975 and thereafter until trial to reinforce the testimony of MR. ZAFFINO, who never went to any police or federal authority concerning this matter until he was contacted by the F.B.I.

The nature of the prejudice at this stage of the proceedings consists in the anxiety of the appellant with the then pending investigation - this is tantamount to a post-accusatory period especially when MR. TRUEBNER tells MR. LEO that he cannot



help being a defendant. The records of MR. SILBERKLEIT are not produced because of the lapse of the three year period between the offense and investigation. As justification for the delay, MR. TRUEBNER mentions the investigation of the charge against the appellant under 18 U.S.C. 1014. (68). However, on cross-examination, he admits that that case was a simple one. (88-9). MR. TRUEBNER did not feel that the case was ready for presentation to the Grand Jury in the summer of 1973 (91). The case required "compartmentalization". (81). After three years it was still untelligible.

The records of MR. SILBERKLEIT are not produced (84) because he could not find them. MR. ZAFFINO is a poor record keeper and that is why it is important to get the records from MR. SILBERKLEIT. (92).

MR. TRUEBNER then felt that a more experienced AUSA should handle the case although in the fall of 1973, he was there for four years. He too felt that loan-sharking was involved (98).

Is not the appellant being disadvantaged, to say the least, at this stage of the proceedings? We submit that such disadvantage began to reach Due Process proportions when the file has been handled by two AUSAs for two and one-half years and the same proof stays in the file. It is one thing to investigate a

crime and make certain of the sufficiency of proof before putting one through the rigors of an accused. It is another thing to maintain a static position and then merely say that this item or that item must be supplied and that never happens. The time helped the Government to reinforce the memory of the victim witnesses but not that of the appellant. The lack of the records of MR. SILBERKLEIT because of the delay, hurt the appellants in that the legal agreements in writing and memoranda dealing with repayment of the loans would show that repayment, in fact, was obtained legally and voluntarily and not through the heroics alleged by MR. ZAFFINO.

In F.B.I. Agent WALSH'S testimony, the name of LOUIS RUGGIERO arises. (125). MR. DeRAFFAELE had testified at trial that he went to see MR. RUGGIERO on that day in July 1970. He also testified that he would borrow huge sums from MR. RUGGIERO. In fact, MR. WALSH always felt that MR. RUGGIERO was a money lender. (158). It appears that MR. RUGGIERO came to the F.B.I. with the information he obtained from MR. ZAFFINO. MR. RUGGIERO was murdered in July 1974. Certainly if the U. S. Attorney had received a statement from MR. RUGGIERO or interviewed him and had accused the appellant soon after it learned of the events, the appellant would have had a valuable witness. The Government would have used



him as a witness. (183). He also had immeasurable value to the proof on behalf of the appellant. Since he knew MR. ZAFFINO very well (125), maybe he would testify that BRUNO ZAFFINO was never really afraid of the alleged threats because he left the Halstead Inn and did nothing to save his nephew. After being allegedly shot at by the appellant he went back to work. Maybe FLORENZE ZAFFINO was nervous by reason of his illness only. Furthermore, it is revealing that MR. RUGGIERO never told BRUNO ZAFFINO or FLORENZE DeRAFFAELE that he had spoken to the F.B.I. (162-3). Perhaps in this way, MR. RUGGIERO could withhold some information and divulge other information without such information being confirmed by MESSRS. ZAFFINO and DeRAFFAELE. Yet BRUNO ZAFFINO told MR. RUGGIERO all about the incidents. (288). Certainly, BRUNO ZAFFINO and FLORENZE DeRAFFAELE were not novices in the business of obtaining monies for operating capital. They were customers of MR. RUGGIERO. His testimony would have been as valuable to the appellant as it would have been to the Government. However, in July 1974, four years after the alleged offense, he is dead.

MR. WALSH was asked whether the great bulk of the investigation was done between September 1971 and first part of 1972. (150). The answer is unresponsive, however, in separating the fabric, it appears to be yes. The Government too had to test



the memory of the victim witnesses before Grand Jury presentment. Of course, it is obvious that the Government took all the time it needed in which to do so.

MR. WILSON would have used MR. RUGGIERO as a Government witness. (183). He testified to substantially the same type of surveillance of the case as did MESSRS. SAGOR and TRUEBNER however, in February 1975, more than 3-1/2 years after BRUNO ZAFFINO saw MR. WALSH, he testifies before the Grand Jury and there is an indictment voted against the appellant.

In none of the cases in this Circuit or in the Marion case, do we have the benefit of an evidentiary hearing that assumes the proportions present in this case. The investigation of this matter was really completed in early 1972 however, it took three years to indict. There can be no excuse that the Government was cautious about falsely accusing the appellant. They had identified him in late 1971 as the alleged offender. They had interviewed the victim witnesses. No question of public policy can apply to these facts. The issue of probable cause never changed from the beginning of this case to the indictment.

Let us now look to several aspects of the proof adduced by the Government and how its offer, in view of the inordinate and inexplicable delay, results in actual prejudice to the

appellant.

Firstly, MR. SAGOR was concerned about the photographic identification of the appellant. (48). Rightly, he should, especially when we consider the record in relation thereto.

BRUNO ZAFFINO testified that DAVID GRANDE and the appellant were look alike. He also testified that in the twelve photographs shown him by the F.B.I., he picked out a photograph of MR. GRANDE. (1344). He repeated that testimony (1347). The Government sought to rehabilitate MR. ZAFFINO with 3503 material dated December 15, 1971, almost four years old. That document did not refresh his recollection - it told him what he did on December 15, 1971. However on June 11, 1975, he recalls that he picked out MR. GRANDE from the spread of photos. This is an area where MR. ZAFFINO could have believed he was selecting a photograph of MR. LEO when he picked out one of MR. GRANDE.

In *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 1967, 19 L.Ed. 2d 1247 (1968), the Supreme Court stated, in connection with photo identification:

"It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most



correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification".

We submit that the photo spread was highly suggestive and improper.

Considering this fact with the acquittal on the second count of the indictment, one could surmise that the jury never considered that MR. LEO made any threats to any of the victim witnesses, that although he was physically present in the Halstead Inn, he could and did not possess or shoot a firearm at MR. ZAFFINO. This failure of BRUNO ZAFFINO'S memory coupled with his loss of records or writings to substantiate the dealings between him and

and MR. GALGANO is just an element of the prejudice inherent in this matter.

Secondly, the Government was always under the impression that the crime involved loan-sharking. The original reports of the F.B.I. are devoid of any rational separation of the checks issued by MRS. DeRAFFAELE and G. ZAFFINO & SONS, INC., as hereinabove referred to in the factual exposition of this brief. Furthermore, BRUNO ZAFFINO never told the Government about judgments obtained against G. ZAFFINO & SONS, INC., he and FLORENZE DeRAFFAELE (319-20). The Government then realized that the case was not of the proportions clasically within the statute, however, they did not abort their investigation but sat on it for over three years. MR. DeRAFFAELE was not well. MR. ZAFFINO had trouble remembering what happened. MRS. DeRAFFAELE could not identify the "voices" on the telephone. This was the real problem that MESSRS. SAGOR and TRUEBNER ment by their failure to process the matter to any extent while it was under their tutelage. However, all was not lost. They had five years to bring it all together. Then the indictment is voted and in the months of March and April, 1975, the Government learns that defense counsel for LEO has taped a statement of one LARRY PERONE and RICHARD DONAHUE, who were at the Halstead Inn. If the matter



was consummated in 1971, 1972, 1973 or 1974, the Government would not have had these witnesses. No mention is made of their interview with any Governmental agency, however, the inordinate time lapse permitted these witnesses to say that they didn't want to get "involved" and in fact, did not get "involved" since their presence at the Halstead Inn.

Their first statement on March 24, 1975 to defense counsel, mentions nothing of any consequence concerning the matter. Certainly no mention is made of the incident in the kitchen.

Their next statement to F.B.I. Agent WALSH is the same as the statement of March 24, 1975.

Their next statement of April 29, 1975 reflects some "new" testimony although it was not until June 4, 1975 that they "flipped" and recanted their testimony of March 24, 1975. They admit they lied to everyone except at trial. The events as testified to by them elevated the case against the appellant to higher proportions. The important thing is that as a result of the pre-accusation delay the Government was able in the post-accusation period to prepare their case. They admittedly could always have obtained an indictment against the appellant with what was in their file. PERONE and DONAHUE never testified before

the Grand Jury. However, there was no indictment until February 1975. Then through preparation by defense counsel, the Government is able to pursue these two persons, with criminal backgrounds, until they "flip" and embellish the Government's case. Why then are they driven to Court from their home and sequestered in the U. S. Attorney's office for fourteen hours prior to the trial? The delay permitted the Government to obtain these liars as witnesses. Of course, one could say that it was in the jury's province to reject their testimony. However, juries look for corroboration although none is necessary. They may have found it in PERONE and DONAHUE although they testified most specifically to events almost five years ago, however, failed to reveal those events up until that time. It is interesting that FLORENZE DeRAFFAELE was never asked to confirm the stories of PERONE and DONAHUE in the Halstead Inn and its kitchen. Those stories emanated solely from PERONE and DONAHUE.

The F.B.I. did not know of PERONE and DONAHUE until 1975. It might be argued then: how could the pre-accusation delay permit the Government to use PERONE and DONAHUE if they didn't know about them until 1975? The answer is that the Government would not have known of them prior to 1975 and thus would not have had them testify at a trial in 1972, 1973 or 1974. The delay was not



caused by the Government's failure to have these witnesses. The delay was caused by the diminution in the criminal activity first thought by the Government to be present in this case. The beginning of the case showed loan-sharking (1467-8) without any mention of any judgments obtained in a Court of law. (1474).

The failure of the Government to present this case to a Grand Jury long before February, 1975, without any legal reason, coupled with the fact that the quality of its case never changed, displays a recklessness tantamount to deliberate conduct. Such conduct mandates dismissal of the indictment.

The words of Justice Douglas are all the more applicable here:

"When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his". United States v. Marion, 404 U.S. at p. 331.

The case is really reduced to the repayment of loans and insufficient checks to MR. GALGANO in the sum of \$9,910.00 since the repayment of the sum of \$13,000.00 some-odd was pursuant to the court judgments. When the statute of limitations was upon the Government, they had to pursue the matter further. The time lapse never hurt them - it irreparably damaged the appellant.

In Hedgepeth vs United States 364 F. 2d 684 (D. C. Cir.

1966), the Court stated:

"The possibility of prejudice from the delay is an important factor in close cases. But the very assumption of the Sixth Amendment is that unreasonable delays are by their nature prejudicial. It is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay. Of course, the likelihood of prejudice is undoubtedly an inevitable consideration in determining whether a particular delay is undue".

The gravamen of the appellant's position is found in United States vs Parish, 468 F. 2d 1129 (D.C. Cir. 1971) at P.1133:

"The Fifth Amendment, on the other hand, insures among other things that "no person shall be . . . deprived of life, liberty, or property, without due process of law". Essential fairness is a fundamental due process requirement in criminal prosecutions, and untoward delay in notifying the accused of the charges to be pressed breeds unfairness by adversely affecting the preparation and presentation of his defense. Statutes barring prosecutions after lapse of designated time periods interpose "the primary guarantee against bringing overly stale criminal charges", but "the statute of limitations does not fully define the [accused's] rights with respect to the events occurring prior to indictment". On the contrary, "the Due Process Clause of the Fifth Amendment . . . require[s] dismissal of the indictment if it [is] shown at trial that the pre-indictment delay in [the] case caused substantial prejudice to [the accused's]



rights to a fair trial and that the delay was a purposeful device to gain tactical advantage over the accused". While the Speedy Trial Clause addresses damage to the defense and other apprehensions as well, the concern of the Due process Clause is erosion of the accused's capability to muster his response to the charges."

In another District, the United States District Court found that "unnecessary delay" in presentment to a grand jury proved fatal to that indictment thereafter filed. *United States vs Golon*, (Dist. Massachusetts, 1974) 378 F. Supp. 516.

The Court of Appeals for the District of Columbia Circuit, in *Woody vs United States*, 370 F. 2d 214 (1960) and *Ross v. United States*, 349 F. 2d 210 (1965), struck down the indictments because of pre-arrest delay of seven and four months, respectively.

The essence of that opinion is found in the following language:

"The controlling principles to be applied in the present case were declared by this Court in *Ross v. United States*, supra. We were recognized that despite the public interest in undercover narcotics investigations by the police,

[T]he Constitution contemplates a separate interest in fair procedures for the citizen faced with the loss

of his liberty by reason of criminal charges. When interests of this nature impinge upon each other, as they have a way of doing, they must be accommodated. A balance must be struck, if one or the other is not to be sacrificed completely. We see no inevitable necessity for such a sacrifice here. Certainly there need be none if the Police Department in pursuing the one interest is not wholly oblivious of the other.

To strike this balance the Court in *Ross* looked to two factors - the prejudice to the defendant stemming from the method of investigation and the reasonableness of the police conduct.

Our discussion of prejudice in *Ross* and the subsequent *Narcotics Delay* cases was framed primarily in terms of the ability of the accused to prepare and present a defense at trial. But the ultimate prejudice that has concerned us in these cases has been the risk of erroneous conviction attributable to the process which led to the verdict of guilt. Delays prior to arrest which hinder or prevent presentation of a defense shackle our system of determining truth through the adversary process. The reliability of the verdict then depends solely upon the quality of the police identification. The more inherently unreliable the method of identification the more the ultimate prejudice - the risk of erroneous conviction".



POINT II

THE COURT BELOW ERRED IN ADMITTING THE TESTIMONY OF MRS. C. DeRAFFAELE CONCERNING TELEPHONE CALLS TO HER

The Court below erred in overruling the objection of appellant's counsel to the testimony by MRS. DeRAFFAELE concerning the telephone calls received by her (545-9). The Court thus permitted an inference to be made from inadmissible testimony.

It is well settled that the identity of the speaker on a telephone must be satisfactorily established before it is admissible. New York Life Insurance Co. vs Silverstein 53 F. 2d 986 (8th Cir. 1931). MRS. DeRAFFAELE testified that she did not recognize the voices on the telephone or did she think that they belonged to the appellant.

There was no foundation for this testimony and it was damaging to the appellant. MRS. DeRAFFAELE had hardly spoken to him at her house and could not identify his voice. Even if argument was to be made for admission of such testimony circumstantially, the contact between the appellant and MRS. DeRAFFAELE was admittedly so minimal that she had no foundation of identification of the voice. Such testimony should have been stricken and the jury so cautioned.

POINT III

THE COURT BELOW ERRED IN  
PERMITTING MR. DeRAFFAELE  
TO TESTIFY TO THE REPUTA-  
TION OF DAVID GRANDE

The Court erred in permitting MR. DeRAFFAELE to testify to his knowledge of the reputation of MR. GRANDE.

This testimony was rank hearsay and had to involve the appellant in the ambit of its effect. There was no fear of MR. LEO by this witness - there is no testimony to indicate any however, because of the witness' unfounded fear of MR. GRANDE the jury could not help but to include MR. LEO in that fear.

In Richardson on Evidence, Tenth Edition, at Sec. 352, it is stated:

"Evidence of reputation, when offered for the truth of the matter reputed, is hearsay and when admitted, is received under an exception to the hearsay rule. Evidence of reputation not offered for the truth of the matter reputed, but for some other relevant purpose, is not hearsay".

Of course, it can be argued that such testimony of MR. DeRAFFAELE was designed to show his state of mind however, because MR. GRANDE is not a named defendant or co-conspirator, it has to appear like the truth to the witness and thus the jury.



Who can rebut such testimony? It was offered indirectly for the truth of its contents. Suppose the impression of MR. DeRAFFAELE is completely false however, the effect upon the jury is not dispelled.

Certainly in view of MR. DeRAFFAELE'S testimony that it was MR. LEO'S association with MR. GRANDE which caused him to be afraid of MR. LEO and nothing else, the reputation testimony becomes crucial. There is an effort here to prove guilt by association with no concomitant availability to prove otherwise. There is no mutuality of proof. MR. GRANDE has been dead since April, 1971.

POINT IV

THE REQUIREMENTS OF 18 U.S.C.  
894 & 2 REQUIRE KNOWING PARTI-  
CIPATION BY THE APPELLANT TO  
WARRANT CONVICTION

It is well settled that:

"[K]nowledge that a crime committed, even when coupled with presence at the scene, is generally not enough to constitute aiding and abetting". In *Nye & Nissen v. United States*, 336 U.S. 613, 69 S. Court, 766, 93 L.Ed. 919 (1940, the Supreme Court said, quoting Judge Learned Hand in *United States vs Peoni*, 100 F. 2d 401, 402 (2 Cir. 1938):

"In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed". *United States v. Garguilo*, (2d Cir. 1962), 310 F. 2d 249.

Also, the Government must prove that the principal committed the crime. *Shuttlesworth v. City of Birmingham*, 373 U. S. 262, 83 S. Ct. 1130, 10 L.Ed. 2d 335 (1963). Here, the Government could not prove that MR. GRANDE was a principal because he was not a named defendant. There is no proof that MR. LEO aid and abetted MR. GALGANO.



Assuming that the indictment alleged a conspiracy, which it does not, the law has been well stated in United States v. Fantuzzi, (2d Cir. 1972) 463, F. 2d 683, at p.689:

"It is hornbook law that before the statements of the other conspirators concerning Bruno may be used as evidence against him it must be proved that Bruno was in fact part of the conspiracy. See, i.e., Glasser v. United States, 315 U.S. 60, 74, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Thus, as it was held in United States v. Geaney, 417 F. 2d 1116, 1120 (2 Cir. 1969), cert. denied, sub nom. Lynch v. United States, 397 U.S. 1028, 90 S.Ct.1276, 25 L.Ed.2d 539 (1970), "the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances". We hold that, as a matter of law, the evidence here, taken, in a light most favorable to the Government, did not establish Bruno's participation in the conspiracy".

There is no testimony to show that MR. LEO was part of any conspiracy, joint venture or much less, he was not a conscious participant of any proceedings testified to by the complaining witnesses. In fact, the Court in its charge, alluded to the absence of a conspiracy. (1833).

It was requested of the Court that <sup>its</sup> charge concerning "aiding and abetting" as to DAVID GRANDE be clarified. (1842).

The Court declined to do so unless the jury indicated that such additional clarification did not satisfy them. The fact remains that only one juror responded in the affirmative (1847) therefore, it is difficult to tell whether the jury was thus satisfied. However, the jury obviously could not separate the appellant from MR. GRANDE as requested, since there was inadequate basis to include MR. LEO as aiding and abetting MR. GALGANO. To this extent, the Court erred in refusing to charge as requested.

This appellant, insofar as the brief of the appellant GEORGE GALGANO is dispositive of the instant appeal, adopts the general and specific arguments as presented therein and the cases cited in support thereof.



CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE REVERSED AND  
THE INDICTMENT DISMISSED.

Respectfully Submitted,

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CRIMINAL DOCKET  
UNITED STATES DISTRICT COURT

1A

75 CRIM. 208

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	George E. Wilson AUSA
GEORGE GALGANO - 1 ct.	791-1953
VICTOR LEO - 2 cts.	
a/k/a Victor Bianco	
	For Defendant:

(12) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk				
J.S. 3 mailed ✓	Marshal				
Violation	Docket fee				
Title 18					
Sec. 891, 894, & 2					
921, (a)(2)(3) & 924(c)					
Exorbitant credit transaction. (Ct. 1)					
Use of firearm to commit a felony. (Ct. 2)					
(Two Counts)					

DATE	PROCEEDINGS
2-28-75	Filed indictment. B/W's ordered. B/W's issued.
3-10-75	Deft. Galgano (atty. present) Pleads not guilty. Motions returnable in 10 days. Bail fixed at \$20,000. P.R.B. secured by \$2,000. cash or surety. Deft. Leo (no atty.) Court directs entry of not guilty plea. Motions returnable in 10 days. Bail fixed at \$20,000. P.R.B. secured by \$2,000. cash or surety. Case assigned to Judge Lasker for all purposes Pollack, J.
3-12-75	GEORGE GALGANO - Filed Notice of Appearance of Atty Kassne & Detsky, 122 East 142nd Street, New York City, 10017 Tel# 212-661-8190.
3-12-75	VICTOR LEO - Filed Notice of Appearance of Atty Donald Schinder, 260 Harrison Ave, Harrison, NY Tel# 914-835-1227.
4-1-75	VICTOR LEO - Filed Deft's Affidvt and Notice of Motion pursuant to Rule 6(e) F.R.C.P., for an order permitting the Deft to inspect the minutes of all proceedings had before the Grand Jury, etc. ✓

DATE	PROCEEDINGS
4-2-75	GEORGE GALICANO= Filed Deft's authority in support of motion to dismiss the indictment. ✓
4-2-75	GEORGE GALICANO= Filed Deft's Notice of Motion to Dismiss Indictment. ✓
4-14-75	VICTOR LEO= Filed Deft's Memorandum of Law-Statement of Facts. (To Judge) ✓
4-18-75	BOTH DEFT'S= Filed Pltff's Affidvt in opposition to Deft's motion to dismiss. ✓
4-18-75	BOTH DEFT'S= Filed pltff's Affidvt in opposition to Deft's motion (VICTOR LEO) to inspect Grand Jury Minutes, ect. ✓
4-18-75	VICTOR LEO= Filed pltff's Memorandum of Law in opposition to Deft's motion for inspection of Grand Jury Minutes, ect. ✓
4-29-75	VICTOR LEO= Filed Defts Reply Memorandum of Law. ✓
4-4-75	BOTH DEFT'S= Filed the following papers rec'd from Magistrate RaJy (Mag#75-346): Docket Entry Sheets - Appearance Bond in the amount of \$20,000. with \$2,000. security, Receipt #47837. Appearance Bond in the amount of \$20,000. with security of \$1,200, Receipt #47875.
5-9-75	✓ GEORGE GALICANO= Filed MEMO ENDORSEMENT on Deft's motion to dismiss indictment filed 4-2-75. - Motion granted to the extent of ordering an evidentiary hearing to determine the reason for the delay in bringing the indictment and whether the Deft's or either of them has been prejudiced by the delay. (m/n 5-12-75) LASKER, J. (Cont'd on Page 2)
5-9-75	VICTOR LEO= Filed MEMO ENDORSEMENT on Deft's Notice of Motion pursuant to Rule 6(e), of the F.R.C.P. filed 4-1-75. Motion denied except to the extent that the Court will inspect the Grand Jury minutes in camera. Motion to dismiss the indictment granted to the extent of ordering an evidentiary hearing to determine the reason for the delay in bringing the indictment and whether the deft's or either of them has been prejudiced by that delay.---LASKER, J. (m/n 5-12-75) ✓
5-9-75	BOTH DEFTS= Trial adj'd untl hearing 6-4-75.
6-4-75	Both Defts= Trial begun Jury selected--Trial con'd on Jun 5, 6, 9, 10, 11, 12, 13, 16, 17.--Summations, Jury Charge Jury deliberation on the 17th Cont'd on Jun 18 Jury still deliberating--Verdict- Jury Finds Deft. G. Galicano Guilty on Ct. 1, Deft/ Victor Leo Guilty on Ct. 1 and N/G on Count 2. Bail cont'd as to both defts. Sentence set for 8-4-75 at 10Am for both defts. Lasker, J.
7-10-75	Filed transcript of record of proceedings dated July 13, 1975
8-4-75	VICTOR LEO= Filed Judgment & Commitment Order = The Deft is hereby committed to the custody of the Atty General for imprisonment for a period of FIVE (5) YEARS and on condition that the Deft. be confined in a jail or treatment type institution for a period of SIX (6) MONTHS. the execution of the remainder of the sentence of imprisonment is suspended and the Deft. placed on Probation for a period of FOUR (4) YEARS and SIX (6) MONTHS, subject to the standing probation order of this Court. Deft continued on present bail of \$20,000. PRS secured by \$2,000. Cash or security pending appeal---LASKER, J.

(Cont'd on Page 2)



## D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
8-4-75	GEORGE GALGANO= Filed Judgment & Commitment Order= The Deft is hereby committed to the custody of the Atty General for imprisonment for a period of FIVE (5) YEARS on the condition the Deft. be confined in a jail or treatment type institution for a period of SIX (6) MONTHS, the execution of the remainder of the sentence of imprisonment is suspended and the Deft. placed on Probation for a period of FOUR (4) YEARS and SIX (6) MONTHS, subject to the standing probation order of this Court. Deft. continued on present bail of \$20,000. PRB secured by \$2,000. Cash or surety pending appeal.—LASKER, J.
8-4-75	VICTOR LEO= Filed Deft's P.R.B. Pending Appeal in the sum of \$20,000. secured by \$2,000. Cash —CLERK
8-4-75	GEORGE GALGANO= Filed Deft's P.R.B. Pending Appeal in the sum of \$20,000. secured by \$1,200. Cash —CLERK
8-11-75	VICTOR LEO= Filed Deft's Notice of Appeal to the U.S.C.A. for the 2nd Circuit from the Judgment entered on 8-4-75 (Copy mailed to Deft & U.S. Atty)
8-12-75	GEORGE GALGANO= Filed Deft's CJA-23 Financial Affdvt.
8-12-75	GEORGE GALGANO= Filed Deft's Notice of Appeal to the U.S.C.A., 2nd Circuit from the judgment of conviction entered on 8-4-75. Leave to Appeal in Forma Pauperis is hereby GRANTED.—LASKER, J. (Copy mailed to AUSA & DEFT)
8-18-75	Filed transcript of record of proceedings, dated: 8-11, 12, 13-75
8-18-75	Filed transcript of record of proceedings, dated: 8-11, 12, 13-75
8-18-75	Filed transcript of record of proceedings, dated: 8-11, 12, 13-75
8-28-75	BOTH DEFT'S = Filed Notice that the record on Appeal has been certified and transmitted to the U.S.C.A. for the 2nd Circuit.
9-2-75	GEORGE GALGANO= Filed Notice that the Supplemental record on appeal has been certified and transmitted to the U.S.C.A. for the 2nd Circuit.
8-20-75	Filed transcript of record of proceedings, dated: 8-11, 13, 14-75

GEW:ew  
72-0072

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----xx

UNITED STATES OF AMERICA :

- v - :

GEORGE GALGANO and : INDICTMENT

VICTOR LEO a/k/a :  
Victor Bianco, : 75 Cr. 208

Defendants. :

-----x

COUNT ONE

The Grand Jury charges:

From on or about July 17, 1970 to on or about November 24, 1970, in the Southern District of New York, GEORGE GALGANO and VICTOR LEO a/k/a Victor Bianco, the defendants, unlawfully, wilfully and knowingly did participate in the use of extortionate means, to wit, the use, and an express and implicit threat of use, of violence and other criminal means to cause harm to the person, reputation, and property of persons, including Bruno Zaffino, Clementine DeRaffele and Florenz DeRaffele to collect and attempt to collect extensions of credit and to punish such persons for the nonpayment of extensions of credit.

(Title 18, United States Code, Sections 891, 894 and 2).



GEW:ew  
72-0072

COUNT TWO

The Grand Jury further charges:

From on or about July 17, 1970 to on or about August 10, 1970, in the Southern District of New York, VICTOR LEO a/k/a Victor Bianco, the defendant, did unlawfully, wilfully and knowingly carry a firearm, while committing a felony for which he may be prosecuted in a court of the United States, to wit, the felony in violation of Title 18, United States Code, Sections 891, 894 and 2 charged in the First Court of this Indictment.

(Title 18, United States Code, Sections 921(a)(2)(3) and 924(c).)

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FOREMAN

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PAUL J. CURRAN  
United States Attorney

USA vs 1  
Galgano & Leo 2

6/17/75 3

J Lasker 4

GW1

CHARGE OF THE COURT

(Lasker, J.)

Ladies and gentlemen, before I start my formal charge, I want to state to you that I wish I could charge you simply in conversation as I am addressing you at the present time. That might be a lot more effective in capturing your attention or retaining your attention. Unfortunately, these days, like everything else in life, the law is more complicated than it was in the good old days when the judge simply talked to the jury and told them what the law was.

Furthermore, in a criminal case, of course the matter is of significant importance to both the government and to the defendants, and we all want to be sure that the law is related to you as impeccably as possible, and for reasons of that kind I have, as has now become the custom in this court and most large courts, reduced my charge to writing.

I mention that to you to explain why I am going to read my charge. I also mention it to you because I may have a tendency to read fast, and if I do and if any of you find it at all difficult to understand what I am saying or to absorb what I am trying to get across to you, I ask you to raise your hand so that I will be notified



1 GW2

2 and I will adjust my pace accordingly.

3 Ladies and gentlemen of the jury, now that you  
4 have heard the testimony and the arguments of counsel, the  
5 time has come to instruct you as to the law in this case.

6 You have been chosen and sworn as jurors in this  
7 matter to try the issues presented by the allegations of  
8 the indictment and on your determination of the facts --  
9 and I stress the words "your determination" -- to decide  
10 under the law as I shall instruct you whether the govern-  
11 ment has proven the charges against George Galgano or  
12 Victor Leo beyond a reasonable doubt.

13 I will discuss the charges with you later in  
14 detail, but before that I want to give you a few important  
15 instructions.

16 First, you are to perform your duty as jurors  
17 without bias or prejudice to or for anybody, whether the  
18 government or either of the defendants. The law does not  
19 permit jurors, and you would not want it to permit jurors,  
20 to be governed by sympathy or swayed by prejudice or public  
21 opinion.

22 Of course, the fact that the government is a  
23 party here, that is, that the prosecution is brought in  
24 the name of the United States, entitles it as a party to  
25 this lawsuit to no greater consideration than that accorded

1 GW3

2 to any other party to a litigation. By the same token, it  
3 entitles it to no less consideration. All parties, the  
4 government and individuals alike, stand equal before this  
5 bar of justice.

6 Second, we start with the proposition that we  
7 started with at the outset of the trial, that is, that the  
8 law presumes every defendant to be innocent of every charge  
9 against him. You will recall that when I selected you to  
10 serve on this jury I specifically asked you if you could  
11 enter on the discharge of your duties presuming either  
12 defendant to be innocent unless proven guilty beyond a  
13 reasonable doubt after your own deliberations, and each  
14 of you gave me the answer yes.

15 This presumption of innocence is alone sufficient  
16 to acquit any defendant unless or until you, as jurors,  
17 have unanimously satisfied yourselves beyond a reasonable  
18 doubt of the particular defendant's guilt on the particular  
19 charge from all of the evidence that's been presented.

20 Now, the burden or the responsibility is on  
21 the government to prove a defendant guilty beyond a  
22 reasonable doubt of every essential element of the crime  
23 charged against him, and I will of course advise you later  
24 in this charge just what elements there are to each of the  
25 charges.



1 GW4

2 Third, the existence of the indictment, as I  
3 told you at the outset of the trial, does not constitute  
4 evidence against either defendant but is merely a method  
5 of bringing a charge against him.

6 You must bear in mind, by the way, that legal  
7 responsibility is personal. Indeed, all responsibility, in  
8 my view, is personal. The guilt or innocence of either  
9 of the defendants on trial before you must, of course, be  
10 determined separately with respect to him, solely on the  
11 evidence or the lack of evidence presented against him.  
12 The case of each defendant, in other words, stands or falls  
13 upon the proof or lack of proof of the charge against him  
14 and not against someone else.

15 Now, I have said that the government has the  
16 responsibility of proving a defendant guilty beyond a  
17 reasonable doubt. Let me define that important term for  
18 you at the outset.

19 A reasonable doubt is not a vague, speculative or  
20 imaginary doubt. It is a doubt which, as the phrase  
21 suggests, is based on reason and which comes either from  
22 the evidence that has been put before you and has been  
23 heard and seen or from the lack of evidence that you have  
24 not heard or seen. It is a doubt which a reasonable man  
25 or woman might entertain. It is a doubt, and I think this

1 GW5

2 is the best definition, which would cause reasonable people  
3 like yourselves to hesitate to act in relation to matters  
4 of importance in your own private lives.

5 Let us say you have an important decision to make.  
6 How do you go about making that decision? You think about  
7 everything you know about it, you think about everything  
8 you would want to know and you have not been told, and  
9 you say to yourself: Do I have enough information? Do I  
10 have enough dependable information so that I am ready to  
11 act? If you say "I don't," then you have a reasonable  
12 doubt. If you say "I do," then you do not have a reasonable  
13 doubt.

14 Now, a mere suspicion will not justify a conviction.  
15 Suspicion is no substitute for evidence, nor is it  
16 sufficient to convict a defendant if you find that the  
17 circumstances merely render his guilt probable. The law  
18 does not deal in probability. Since the burden or responsibility  
19 is on the prosecution to prove a defendant guilty  
20 beyond a reasonable doubt, a defendant has the right to rely  
21 on the mere failure of the prosecution to establish his  
22 guilt, or the defendant may also, as they have in this case,  
23 of course, rely on his own testimony and the testimony of  
24 his witnesses.

25 Now, in saying that the government must prove



1 GW6

2 its case beyond a reasonable doubt if there is to be a con-  
3 viction I do not mean that the government is required to  
4 prove guilt beyond all possible doubt. Indeed, in human  
5 affairs it is hard to think of anything that we can prove  
6 beyond all possible doubt with the possible exception of  
7 a mathematical proposition. But the proof must be, as I  
8 have said, of such a convincing character that you would  
9 be willing to rely and act on it in the most important  
10 decisions of your own affairs.

11 Now let's talk, ladies and gentlemen, about the  
12 very important question of credibility of witnesses. I  
13 quite agree with counsel, who I think agree with each  
14 other, that the determination in this case depends on your  
15 estimate of the credibility of the witnesses, and, therefore,  
16 I want you to pay close attention to what I am about to  
17 discuss with you because that has to do with the subject  
18 of how you determine the credibility of a witness.

19 The evidence in this case, as I have told you  
20 a number of times, consists of the testimony of witnesses,  
21 the exhibits which have been received in evidence and the  
22 facts which have been stipulated or agreed by counsel.  
23 You are obligated to decide the case solely on the basis  
24 of the evidence, but in your consideration of the evidence  
25 you are not limited to the bald statements of a witness.

1 GW7

2 You are entitled to and, indeed, in this case I think you  
3 must think beyond the words that have been uttered.

4 In deciding the many questions before you, it is  
5 your job to determine the credibility of the witnesses who  
6 have testified here. Now, how do you go about that?

7 Perhaps the best answer is to state that you determine  
8 the truthfulness or accuracy or weight to be given to a  
9 witness' testimony in the same way that you would determine  
10 that question in your own personal affairs. After all, we  
11 are all constantly called upon, if you think about it, from  
12 day to day to determine how much confidence we place  
13 in the statements that people make to us.

14 The truthfulness or dependability of a witness, as  
15 that of any other person you deal with, can be determined  
16 by his demeanor, that is, his look, his relationship to the  
17 case and to the parties, the possibility of his being biased  
18 or partial or his not being biased or partial, the stake  
19 that he may have in the outcome of the case, the reasonable-  
20 ness of his statements, the strength or weakness of his  
21 recollection and the extent to which what he has said has  
22 been either corroborated on the one hand or contradicted  
23 on the other by the testimony of other witnesses or by  
24 exhibits or stipulation.

25 You should take into consideration the interest



1 GW8

2 and stake which a witness has in the outcome of a case,  
3 this case in particular, of course.

4 Each of the defendants of course has a substan-  
5 tial interest in the outcome of the case, but you may  
6 consider that other persons, for example, the government  
7 witnesses or a government agent, may also have an interest  
8 in how the case turns out, and the mere fact that a witness  
9 has an interest in the out come of the case does not  
10 mean that he may not be telling the truth.

11 In a criminal case, a defendant cannot be com-  
12 pelled to take the stand and testify. Whether he testifies  
13 or not is a matter of his own choosing. A defendant who  
14 wishes to testify, as the defendants here have, however,  
15 is a competent witness. That means he has the right to  
16 testify. And the defendant's testimony is to be judged in  
17 the same way as that of other witnesses.

18 Now, there has been testimony also from a  
19 number of witnesses, two, I believe, who are employed by  
20 the government. Just because a witness may be employed by  
21 the government does not, of course, mean that he is entitled  
22 to any greater credibility because he is a government wit-  
23 ness. It is for you to decide how much, if at all, that  
24 interest as a government employee may have affected his  
25 testimony, and you may conclude it has not affected it at

1 GW9

2 all.

3 Of course, the testimony of a witness may also  
4 be impeached by his own prior inconsistent statements unless  
5 there is some explanation of the inconsistency.

6 In ordinary life, when you need to determine the  
7 truthfulness of a person, you ask yourself, don't you, as  
8 you would here, how did he or she impress me? Did his or  
9 her version appear straightforward and candid or did he or  
10 she appear to be trying to hide some of the facts? Did he  
11 or she have any motive to testify falsely or no motive of  
12 that kind?

13 The ultimate question for you to decide on in  
14 passing on the credibility of a witness is whether he or  
15 she told you the truth. It is for you and you jurors alone  
16 to determine the weight and credit to be given to the  
17 testimony. And in making these suggestions, I am giving  
18 you guidelines and I am not attempting, nor have I attempted,  
19 to suggest how to apply the guidelines.

20 If you find that a witness has wilfully, that is,  
21 purposely, testified falsely to any material that is  
22 an important fact or matter, not some matter which you  
23 believe to be unimportant, you may reject the entire testi-  
24 mony of the witness or you may accept such portion of it  
25 as you believe and reject the remainder.



1 GW10

2 Now, ladies and gentlemen, as I have said, your  
3 determination in this case must be based on the evidence.  
4 There are, generally speaking, two types or categories of  
5 evidence from which you may properly find the facts. I  
6 am sure you have heard them referred to often. One is called  
7 direct evidence. That's the evidence of an eye or ear  
8 witness. "I have heard it," such a witness would say, or  
9 "I have seen it."

10 The other is indirect or more generally called  
11 circumstantial evidence. Circumstantial evidence is defined  
12 as proof of events or circumstances which point to the  
13 existence or non-existence of facts as to which there was  
14 no eye witness or ear witness.

15 The law makes no distinction as to the weight of  
16 circumstantial evidence as distinct from direct evidence.  
17 It requires only that the jury find the facts in accordance  
18 with all the evidence in the case, both direct and circum-  
19 stantial, beyond a reasonable doubt.

20 An example, by the way, of the difference between  
21 direct and circumstantial evidence is the following; it is  
22 an example given very often to juries but it's vivid, I  
23 think, and worthwhile.

24 If you looked out the window here and saw that  
25 it was raining, that would, of course, be direct evidence

1 GW11

2 that it was raining. On the other hand, if all the blinds  
3 there were drawn and somebody came through the door over  
4 there with a dripping umbrella, that would be pretty good  
5 circumstantial evidence that it was raining outside. You  
6 wouldn't have seen it with your own eyes but you would have  
7 the right to infer, seeing a man come through the door  
8 with a dripping umbrella, that it was raining outside.  
9 To be sure, he may have been standing under a shower in  
10 one of the rooms in this building that has a shower, but  
11 that would be highly unlikely, and the other inference is  
12 the likely one.

13 Now, ladies and gentlemen, both the United States  
14 Attorney and the defense counsel have during the course of  
15 the trial objected to the introduction of evidence and  
16 addressed arguments to the bench, and we have had to go out  
17 into the robing room and perhaps you have heard our voices  
18 in there. I don't know. I want to tell you at this time  
19 that it is the duty of the attorneys on each side of a  
20 case to make such objections when an attorney believes  
21 that the other side is proposing to put into evidence or  
22 ask questions about something that is not properly  
23 admissible, and nothing that I have said in ruling on  
24 objections expresses any view of mine as to how this case  
25 should be decided. .



1 GW12

2 I come now to discuss the indictment in this case  
3 with you and I ask the clerk to please give me the indict-  
4 ment.

5 The indictment in this case, which contains two  
6 counts, reads as follows:

7 "Count 1.

8 "The Grand Jury charges:

9 "From on or about July 17, 1970, to on or about  
10 November 24, 1970, in the Southern District of New York" --  
11 and I will instruct you that the actions that have been  
12 testified to here did take place in the Southern District  
13 of New York -- "George Galgano and Victor Leo, also known  
14 as Victor Bianco, the defendants, unlawfully, wilfully  
15 and knowingly did participate in the use of extortionate  
16 means, to wit, the use and express and implicit threat of  
17 use of violence and other criminal means to cause harm  
18 to the person, reputation and property of persons, including  
19 Bruno Zaffino, Clementine DeRaffele and Florenz DeRaffele,  
20 to collect and attempt to collect extensions of credit  
21 and to punish such persons for the non-payment of extensions  
22 of credit."

23 That "is" Count 1 and it charges both Mr. Galgano  
24 and Mr. Leo. Count 2 charges only Mr. Leo and reads as  
25 follows:

1 GW13

2 "The Grand Jury further charges:

3 "From on or about July 17, 1970, to on or about  
4 August 10, 1970, in the Southern District of New York,  
5 Victor Leo, also known as Victor Bianco, the defendant,  
6 did unlawfully, wilfully and knowingly carry a firearm  
7 while committing a felony for which he may be prosecuted  
8 in a court of the United States, to wit, the felony in  
9 violation of Title 18, United States Code, Sections 891,  
10 894 and 2, charged in the first count of this indictment."

11 Now let me take up each of these charges with  
12 you separately.

13 The defendants in Count 1 are charged with having  
14 violated Title 18, United States Code, Section 894. That  
15 is an act passed by Congress which reads in pertinent  
16 part as follows:

17 "Whoever knowingly participates in any way or  
18 conspires to do so in the use of any extortionate means  
19 to collect or attempt to collect any extension of credit  
20 or to punish any person for the non-repayment thereof"  
21 is guilty of committing a crime.

22 Now, to extent credit means to make or renew any  
23 loan, and an extortionate means is any means which involves  
24 the use or any express or implied threat of use of violence  
25 or other criminal means to cause harm to the person,



1 GW14

2 reputation or property of any person.

3 In order to convict either Mr. Galgano or Mr.  
4 Leo of the crime charged in Count 1, you must find that  
5 the government has proven beyond a reasonable doubt all  
6 of the following elements:

7 First, that Bruno Zaffino, Florenz DeRaffele  
8 or Clementine DeRaffele owed money to Galgano, Leo or  
9 David Grande.

10 Second, that during the period July 17, 1970,  
11 to November 24, 1970, in the Southern District of New York,  
12 the defendant in question, that is, either Mr. Galgano  
13 or Mr. Leo, whosever case you are then considering,  
14 attempted to collect the money owed and attempted to induce  
15 Zaffino or the DeRaffeles to make a payment on the debt.

16 Third, that in so attempting to collect the  
17 loan, the defendant in question participated in the use of  
18 extortionate means in connection with the collection of  
19 the debt, that is, that the defendant in question used a  
20 means which involved the use or an express or implied  
21 threat of use of violence or other criminal means to cause  
22 harm to the person, reputation or property of the people  
23 charged, that is, Mr. Bruno Zaffino, Mrs. Clementine  
24 DeRaffele or Mr. Florenz DeRaffele.

25 Violence of course means simply physical harm

1 GW15

2 of any kind or threat of such harm.

3 Fourth -- I am still discussing the elements of  
4 the crime charged -- the fourth of those elements is that  
5 the violence was imposed or the threats were communicated  
6 by the defendant to Zaffino or either of the DeRaffeles.

7 And Fifth and finally, that in attempting to  
8 collect the loan in the manner testified the defendant  
9 acted unlawfully, wilfully and knowingly.

10 To act knowingly means that the defendant must  
11 have acted deliberately. He must have known what he was  
12 doing and have done it on purpose and not by mistake or  
13 accidentally or because somebody forced him to.

14 To act wilfully means to act intentionally or  
15 with a bad purpose to do something which the law forbids.

16 Now, in deciding whether each defendant wilfully  
17 used violence or threats of physical harm or other criminal  
18 means, you should take into consideration all of the  
19 evidence in this case bearing on what the defendants intended  
20 in their statements and actions and what they actually  
21 said. Words harmless in themselves may take on a threatening  
22 meaning in the context in which they are used. On the  
23 other hand, you may decide that the words used by the  
24 defendants in the full context of what was said carried  
25 no such threatening significance. The question for you to



1 GW16

2 decide is whether a defendant intended by his words to give  
3 the impression that physical harm or other criminal means  
4 would be used and, if so, whether in the full context of  
5 the conversation the words actually used by the defendants  
6 reasonably appear to you to have stated such threats.

7 The mere voluntary payment of money or the delivery  
8 of property unaccompanied by any express or implied  
9 threats of use of violence or other criminal means to  
10 cause harm to a person or to his or her reputation or  
11 property does not constitute a violation of the statute.  
12 Therefore, unless the payments here alleged were made under  
13 such conditions there is no violation of the law.

14 It goes without saying -- what I am about to  
15 utter applies to both counts -- it goes without saying that  
16 in order to find either defendant guilty you must find  
17 that he was the person who committed the crime alleged.

18 The government has the burden of proving identity  
19 along with all other elements of the crime beyond a reason-  
20 able doubt, and if you are not convinced beyond a reasonable  
21 doubt that either defendant was the person who committed  
22 the crime with which he is charged, you must of course  
23 find that defendant not guilty.

24 In appraising the identification testimony of  
25 a witness, you should consider the following points:

1 GW17

2 First, whether the witness had an adequate oppor-  
3 tunity to observe the defendant identified.

4 Second, whether the identification which the  
5 witness made was the result of his own recollection.

6 Third, the length of time between the occurrence  
7 of the crime and the next opportunity of the witness to  
8 see the defendant identified.

9 It is not essential that the witness who identi-  
10 fied the defendant be absolutely free from doubt as to the  
11 correctness of his identification. Of course, the  
12 credibility of an identification witness is determined in  
13 the same way as that of any other witness.

14 I come now to the description of the law with  
15 regard to Count 2 which charges Mr. Leo. The applicable  
16 law there is Title 18, United States Code, Section 924(c)(2),  
17 which is an act of Congress also, and which reads that:

18 "Whoever carries a firearm unlawfully during  
19 the commission of any felony which may be prosecuted in  
20 a court of the United States" shall be guilty of a crime.

21 In order to prove Mr. Leo guilty on Count 2,  
22 the government must establish to your satisfaction beyond  
23 a reasonable doubt each of the following four elements:

24 First, that between on or about July 17, 1970,  
25 and on or about November 24, 1970, Mr. Leo committed the



1 GW18

2 felony set forth in Count 1 of the indictment, which I  
3 have just discussed.

4 Second, that during the commission of that felony  
5 he carried a firearm.

6 Third, that he carried the firearm unlawfully.

7 And fourth, that he acted knowingly and wilfully.

8 Now, with regard to the first element of Count 2,  
9 I have said that before Mr. Leo can be convicted on Count 2  
10 it must be established that Mr. Leo committed the crime  
11 charged in Count 1. This means that if you find Mr. Leo  
12 not guilty on Count 1 then you must necessarily find him  
13 not guilty on Count 2. If, however, you find Mr. Leo  
14 guilty on Count 1, then you must consider the remaining  
15 elements of Count 2, which I now proceed to discuss.

16 The second element of Count 2 which you must con-  
17 sider is whether during the commission of the felony in  
18 Count 1 Mr. Leo was carrying a firearm.

19 A firearm is defined in law as any weapon which  
20 is designed to expel a projectile or a bullet by the action  
21 of an explosive.

22 The third element that you must find is that Mr.  
23 Leo possessed the firearm unlawfully.

24 "Unlawfully" means simply contrary to law. In  
25 the context of this case, it means carrying a firearm without

1 GW19

2 a permit issued by an appropriate licensing agency, in  
3 this case a license issued by any county of the State of  
4 New York. Thus, if you find beyond a reasonable doubt  
5 that Mr. Leo possessed the firearm without such a permit  
6 you may find that he was carrying it unlawfully.

7 In this connection, the government has intro-  
8 duced in evidence its Exhibit 22, which is a certificate  
9 from the New York State Police Department to the effect  
10 it has made a diligent search and has found no record of  
11 any pistol permit in its files indicating a registration  
12 of a pistol to the defendant Victor Leo under his name or  
13 under the name of Victor Ronald Leo or Victor Bianco or  
14 Frank Bianco. You may accept this certificate as evidence  
15 that the handgun which it is charged that Mr. Leo fired  
16 was not registered to him, but it is up to you to determine  
17 whether you accept the certificate as evidence of that  
18 fact or not.

19 Finally, and this is the last element with regard  
20 to the second charge, you must find that Mr. Leo possessed  
21 the firearm wilfully and knowingly. As I instructed you  
22 earlier, this means that you must be satisfied beyond a  
23 reasonable doubt that the defendant knew what he was doing,  
24 was acting deliberately and voluntarily as opposed to  
25 mistakenly or accidentally or as a result of coercion.



1 GW20

2 Of course, it is not necessary that Mr. Leo be  
3 shown to have known that he was violating any particular  
4 law. Rather, it is sufficient if you are convinced beyond  
5 a reasonable doubt that he was aware of the general unlawful  
6 nature of his act.

7 Now, it has been indicated that the government  
8 in this case relies not only on the acts of Congress which  
9 I have already specified to you but also on Title 18,  
10 United States Code, Section 2, which reads:

11 "Whoever commits an offense against the United  
12 States or aids, abets, counsels, commands, induces or  
13 procures its commission, is punishable as a principal."

14 That means as somebody who committed the crime  
15 himself. In other words, any person who commits an act  
16 in violation of a criminal statute commits a crime, but it  
17 is also a crime not only to commit the illegal act but  
18 to aid or abet or induce another person to commit such an  
19 act.

20 Accordingly, if you find beyond a reasonable doubt  
21 that in Count 1 either defendant aided or abetted the other  
22 in the commission of the crime charged, you would have a  
23 sufficient basis for finding the abettor guilty of the  
24 crime charged himself.

25 Now, in order to find that a defendant aided and

1 GW21

2 abetted another in the commission of a crime, you must  
3 find beyond a reasonable doubt that he associated himself  
4 with the criminal venture, that is, he participated in it  
5 as something which he wished to bring about or that he  
6 sought by his action to make the crime succeed.

7 Thus, to find a defendant guilty of aiding and  
8 abetting, you must of course find something more than mere  
9 knowledge on his part that a crime was being committed, for  
10 a mere spectator at a crime is not a participant. But  
11 in order to convict, it is not necessary that you find  
12 that a defendant himself did all the acts. If a defendant  
13 caused an act to be done which, if directly performed by  
14 him, would be an offense against the United States, in  
15 law it is as if the defendant himself had done the act.

16 Now, there has been discussion here as to the  
17 motive of a defendant to commit the crime with which he is  
18 charged or alternative to the absence of motive.

19 I instruct you that the proof of motive is not  
20 a necessary element of the crime with which a defendant is  
21 charged. Proof of motive does not establish guilt, nor  
22 does want of proof of motive establish that a defendant is  
23 innocent. If the guilt of a defendant is shown beyond a  
24 reasonable doubt, it is immaterial what a defendant's motive  
25 for the crime may be or whether any motive may be shown;



1 GW 22

2 but the presence or absence of motive is a circumstance  
3 which you can consider as bearing on the intention of the  
4 defendant.

5 There has been testimony that the defendant  
6 Galgano told federal officers that he had assigned the  
7 monies owed to him to Mr. Leo and Mr. Grande, that he had  
8 not hired Mr. Leo and Mr. Grande to collect the monies for  
9 him and that the reason why the checks from Mr. Zaffino  
10 and Mrs. DeRaffele were made payable to him was that Mrs.  
11 DeRaffele requested this method of payment.

12 There has also been testimony that, to the con-  
13 trary, it was Mr. Galgano who insisted that the checks be  
14 made payable to Galgano Realty Corporation.

15 Now, there is also testimony before you regarding  
16 a statement by Mr. Leo that he told federal officers that  
17 he was known as Victor Bianca. I stress the "a" because  
18 it is Mr. Bianca's testimony that he denied having been  
19 known by the name of Bianca.

20 On the other hand, witnesses have identified Mr.  
21 Leo as the man they knew as Frank or Victor Bianco.

22 I instruct you that a defendant's statements  
23 which tend to establish his innocence if you believe those  
24 statements to be false are circumstantial evidence of a  
25 guilty mind and have independent probative force which you

1 GW23

2 may consider in reaching your verdict.

3 Ladies and gentlemen, I have come quite near  
4 the end of my formal instructions, but the most important  
5 part of the case is the part which you are now to play as  
6 ~~THESE MEN ARE TO BE THE ONLY MEN AND YOU ALONE TO DECIDE WHETHER~~  
7 Mr. Galgano or Mr. Leo is guilty of either of the charges  
8 against Mr. Leo or the charge against Mr. Galgano. I know  
9 that you will try the issues that have been presented to  
10 you in accordance with the solemn oath you took as jurors  
11 in which you promised that you would well and truly try  
12 the issues joined in this case based solely on the evidence  
13 which has been put before you in this courtroom and the  
14 instructions as to the law which I am now giving you.

15 I like that phrase "well and truly try the  
16 issues joined in this case." It goes back a thousand years  
17 and its old-fashioned flavor reminds us of all of the  
18 hundreds of thousands of juries who have performed this  
19 function before you.

20 In order for you to reach a verdict of either  
21 not guilty or guilty as to either of the defendants on  
22 either count, your verdict must be, of course, unanimous.  
23 For this purpose I have prepared for you sheets on which  
24 you can record your verdict. I ask the clerk to give the  
25 original of these sheets to Mr. Ellis, who, because he is



1 GW24

2 your number one, I am going to ask to be foreman of the  
3 jury. It's very simple. It reads: Count 1, George  
4 Galgano, not guilty, guilty; Victor Leo, not guilty,  
5 guilty. Count 2, Victor Leo, not guilty, guilty.

6 Mr. Ellis will be in charge of your delibera-  
7 tions and communications to the Court but his being foreman  
8 does not mean he has any more authority in the circumstances  
9 than any other member of the jury, nor that his vote is  
10 more important than any other.

11 Although I have said that your verdict must  
12 be unanimous, each of you must decide individually in  
13 accordance with your own conscience but only after you have  
14 deliberated with your fellow jurors to determine whether  
15 a just verdict has been reached. You should not hesitate  
16 to change your mind if you become convinced that your  
17 original view of the case was not in accordance with the  
18 facts or the law. On the other hand, you should not change  
19 your mind just for the purpose of reaching a verdict as a  
20 matter of convenience. I have no reason to believe that  
21 this jury will not be able to reach a unanimous verdict one  
22 way or the other as to the matters put before it.

23 To sum up, if you find that there is a reasonable  
24 doubt that the law has been violated by either defendant,  
25 you should not hesitate for any reason to acquit that defend-  
ant as to that count.

1 GW25

2 On the other hand, if you find that the law  
3 has been violated as charged by either defendant, you should  
4 not and you may not hesitate because of sympathy or any  
5 other reason to render a verdict of guilty as to that  
6 defendant for that count.

7 Nothing that I have said in these instructions,  
8 whatever it may be, and I stress it, is intended to indicate  
9 any view of mine as to how the various issues put before you  
10 should be decided. That is your job and your job alone.

11 Now, ladies and gentlemen, you have the right  
12 at any time to ask for any of the exhibits. I will not  
13 suggest that all of the exhibits be put down on your table  
14 in the other room because I think that to have them all  
15 together there would simply be confusing, and it is easier,  
16 more concrete, more realistic for you to ask for anything  
17 that is of interest to you.

18 You have a right to put any questions that you  
19 want to the Court. If there is anything that you don't  
20 understand about my instructions or otherwise, and if you  
21 wish to have any testimony read back or if you wish any  
22 other exhibit, it will be helpful if you can be as specific  
23 as possible about the material that you are interested in  
24 so that we can be assisted in locating the material in the  
25 record.



1 GW26

2 The way to get in touch with us, Mr. Ellis, is  
3 to give a note to the marshal who will be standing just  
4 outside the door of the jury room.

5 I neither encourage nor discourage you in  
6 asking for testimony or exhibits, but I certainly want you  
7 to ask for whatever you want.

8 I have now come to the very end of my instructions.  
9 I will retire to the robing room for the last time as far  
10 as the jury is concerned and confer briefly with counsel to  
11 see whether they believe that the charge of the Court  
12 requires any clarification, and we will be out in just a  
13 moment. I ask you to wait for us at this time.

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USA v.  
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1 gwlm 1

2 (In the robing room.)

3 THE COURT: Gentlemen, each of you make your  
4 own objections.

5 MR. KREINCES: In connection with your Honor's  
6 charge on alleged false statements to federal officers --

7 THE COURT: Exculpatory statements?

8 MR. KREINCES: Yes. -- Your Honor indicated he  
9 had said that he had not been known by the name of Victor  
10 Bianco<sup>o</sup> because it is Mr. Bianco's testimony that he was  
11 known as Frank Bianco, instead of saying it was Mr. Leo's  
12 testimony he was known.

13 THE COURT: I would be glad to clarify that.

14 MR. WILSON: In the same connection, I believe  
15 Special Agent Rigger testified that he was asked, and denied  
16 using any other name, any nickname or aliases.

17 THE COURT: I merely said this was Mr. Bianco's  
18 testimony. I am not going to go through the record again.  
19 I will, because Mr. Leo is a defendant, indicate that it  
20 was Mr. Leo's testimony.

21 MR. KREINCES: You said "Bianco" twice instead  
22 of referring to him as "Leo." That is what I mean.

23 THE COURT: I understand that.

24 Anything else?

25 MR. KREINCES: That is all.



1 gwlm 2

2 MR. DETSKY: In your charge on "aiding and abet-  
3 ting," I don't believe you made that very clear to the  
4 jury as to what you meant. Aiding and abetting whom?  
5 Aiding and abetting each other? Aiding and abetting a  
6 third party?

7 THE COURT: I made it very clear. I said before  
8 you can find one aided and abetted the other defendant.

9 MR. DETSKY: Would that include David Grande?  
10 They could be guilty of aiding and abetting him as the  
11 principal.

12 THE COURT: I am not going to suggest they aided  
13 or abetted Mr. Grande. I am not going to suggest it  
14 specifically, in any event.

15 MR. WARBURGH: In that line, I request that your  
16 Honor charge the jury as follows. Because Mr. David Grande  
17 is not a named party in the indictment, I would ask your  
18 Honor charge the jury as follows:

19 If you find the defendant aided or abetted  
20 David Grande, then you would have to find that defendant not  
21 guilty because David Grande is not a defendant or person  
22 named in the indictment.

23 THE COURT: I decline to make such a charge for  
24 two reasons. In the first place, I don't think it is a  
25 correct statement of law; and in the second place, I believe

1831

1 gwlm 3

2 that my charge already has, whether it may be mistaken or  
3 not, referred to aiding and abetting another defendant.  
4 It happens to be the way that the language was given to  
5 me by the Government, if it says that.

6 Yes; says, "Accordingly, if you find beyond a  
7 reasonable doubt that in Count 1 either defendant aided  
8 or abetted the other in the commission of the crime charged,  
9 then," et cetera. I decline to change it.

10 MR. WARBURGH: Also, for the record, to preserve  
11 the record, I object to the Court making a reference to the  
12 defendant's interest in this particular case.

13 Also, with respect to the Court's discussion of  
14 the elements or the applicable law, I believe the Court used  
15 the words "or conspired to do so."

16 There is no conspiracy alleged in this case.  
17 I think the Court should point that out to the jury, because  
18 not to do so would be misleading.

19 THE COURT: All right, I will do that.

20 MR. WILSON: That is the statute.

21 THE COURT: I did read the statute which includes  
22 the word "conspiracy."

23 MR. WARBURGH: The Court will then say there is  
24 no conspiracy involved in this case?

25 THE COURT: Yes.



1832

gwl m 4

MR. WILSON: That is the one item that troubles me. You had cut out part of the definition. The evidence shows that -- talking about checks --

THE COURT: What request is this?

MR. WILSON: No. 2. Originally, I requested the entire definition. You cut part of that out. What you gave was, "to extend credit, means to make or renew any loan or to enter into any agreement," and you stopped.

THE COURT: Yes, I didn't even read, "or enter into any agreement."

MR. WILSON: I guess you didn't. Here, we are talking about checks. If you go on further, it includes all types of debts, "whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, however arising, may or will be deferred."

The thrust of the defense--although I don't agree with it--is that somehow the genesis of the debts had something to do with whether or not threats were made. I think that the jury probably, in view of that, ought to get the entire -- I have heard arguments --

THE COURT: The reason I excluded those words is-- it has nothing to do with the theory of the defense or prosecution -- merely, I felt the words were so much gobbledygook, they would confuse rather than clarify the jury.

1 gwlm 5

1833

2 You are talking too much like lawyers. Any  
3 layman can understand this case. It is as simple as A, B,  
4 C that you are claiming, in the first count here, two  
5 defendants threatened certain people in connection with  
6 the payment of a loan. It couldn't be more basic. We  
7 see it on television, we see it in the movies, we read  
8 about it in the Godfather. Everybody knows what we are  
9 talking about. I will make these two clarifications.

10 (In open court.)

11 THE COURT: There are two small points which I  
12 would like to clarify for you. I may have said -- and if  
13 I did, I did not mean to say -- that Mr. Bianco said that  
14 his name was not Bianco. Of course, I meant to say, Mr.  
15 Leo said that his name was not Mr. Bianco.

16 And in reading one of the Acts of Congress, I  
17 included a reference, because it was in the Act, to the  
18 word "conspire," or "conspiracy."

19 I wish to remind you that the Government does  
20 not charge that there is any conspiracy in this case. If  
21 it had, I would have to give you a long song-and-dance  
22 instruction on conspiracy. It does charge that the  
23 defendants aided and abetted each other.

24 JUROR NO. 3: I didn't entirely understand  
25 "probative."



1 gwlm 6

2 THE COURT: That means: has the quality of  
3 proving something. When something has probative value,  
4 we mean it tends to prove something; and if it does not  
5 have probative value, it does not tend to prove.

6 JUROR NO. 3: In other words, the kind of  
7 evidence.

8 THE COURT: I have never said that anything  
9 does, because it's for you people to decide whether or not  
10 it does have probative value; that is, whether it tends to  
11 prove anything or not. I have said that certain types of  
12 evidence or testimony may have probative value, and you  
13 may consider what probative value you think such evidence  
14 or statements do have.

15 All right. Madam Clerk, will you please swear  
16 the marshals.

17 (Marshals sworn.)

18 THE COURT: Ladies and gentlemen, your long wait  
19 has pretty much ended. It is now up to you, and I ask you  
20 to go with the marshal and commence your deliberations.

21 (At 3:47 p.m., the jury retired to deliberate  
22 upon a verdict.)

23 THE COURT: Gentlemen, I am going to my chambers  
24 now. I request counsel, insofar as the jury may ask for  
25 items of evidence, to agree as to what those items of

1 gwlw 7

2 evidence are and to transmit them to the jury without the  
3 necessity of my having to come here.

4 If there is a request for testimony, I also  
5 request counsel, with the assistance of the reporter, to  
6 find the testimony before I have to come here; and if there  
7 is no controversy as to what is to be read to the jury,  
8 I would appreciate the agreement of both sides that I need  
9 not sit here like a sitting duck, just to listen to the  
10 reading of the testimony.

11 Sometimes the Court's assistance is needed,  
12 either to get the jury in, to find out what the jury  
13 means by a message, or to determine whether--for example,  
14 if certain testimony is asked to be read -- the jury means  
15 all of it or the direct examination or the cross-examina-  
16 tion. Of course, I would be glad to find out about those  
17 things.

18 I authorize the clerk to open any note received  
19 from the jury, but not to disclose its contents to anybody  
20 until she reads it to me on the telephone. I will then  
21 give her instructions as to whether she is to advise you  
22 of the contents of the note, or I will come here.

23 (Recess.)

24 (Note from jury marked Court Exhibit 3.)

25 (5:50 p.m., in open court; jury present.)

xxx



1 gwlm 8

2 THE COURT: Be seated, please.

3 Ladies and gentlemen, I called you in because,  
4 although I don't think it would be reasonable to assume  
5 that you have reached a verdict yet, I felt it fair to  
6 ask you what you wanted to do about the timing of the  
7 situation: whether you want to stay late tonight or you  
8 do not.

9 What I would like to have you do -- I certainly  
10 don't want to ask anybody in open court -- I would like to  
11 have you, Mr. Ellis, go back with the jury and see whether  
12 it is the consensus it would be better to stay because  
13 you might reach a verdict soon, let's say, or if you might  
14 not, you would rather go and return tomorrow morning.

15 You don't have to have unanimity on there, but it  
16 ought to be fair. I don't want to know whose views are  
17 what at any time. I don't want you to report how the jury  
18 stands on anything, but if you could come back and tell  
19 me whether most of you want to stay or all of you want to  
20 stay or vice versa, I will just wait until you are ready.

21 (The jury left the courtroom.)

22 (Note handed to Court.)

23 THE COURT: The jury would prefer to continue  
24 their negotiations tomorrow morning.

25 THE COURT: Bring them in.

1837

1 gwlm 9

2 (Jury enters the courtroom.)

3 THE COURT: Please be seated, ladies and  
4 gentlemen.

5 I have your note which says:

6 "The jury would prefer to continue its delibera-  
7 tions tomorrow morning." Signed by Mr. Ellis.

8 I will ask the court clerk to make a Court exhibit  
9 of it.

10 (Note from jury marked Court Exhibit 4.)

11 THE COURT: That is fine with all of us.

12 We are going to have some complications. I am  
13 starting the trial of another case tomorrow morning, which  
14 will also have a jury, and obviously, you can't both be in  
15 the same room. I guess it is lucky enough for one jury  
16 to get in that room.

17 I have arranged that you will be allotted another  
18 room, and it's Courtroom 518 on the fifth floor. Would  
19 you all write that down now, please. Is there anybody  
20 who doesn't have something to write on? If so, we will  
21 furnish it to you.

22 Mr. Marshal, did you hear that?

23 THE MARSHAL: Yes, your Honor.

24 THE COURT: That is Room 518 tomorrow morning.

25 Counsel, did you get that, also? And anybody

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1 gwlm 10

2 else that is interested in attending there.

3 I will ask you to start 9:30 tomorrow morning  
4 for your own convenience, because I think you would rather  
5 come earlier and, hopefully, **be** able to leave earlier, than  
6 vice versa.

7 You are excused for the evening, but you are  
8 under the same instructions that you have always been,  
9 which is, not to discuss the case with anybody. There may  
10 be even more of an impetus or desire to discuss it with  
11 somebody at home. Please **don't**, ladies and gentlemen.  
12 The law requires you to discuss this case only with your-  
13 selves, and the reason -- I remind you -- is because it's  
14 only the 12 of you, except for us, who have heard all the  
15 evidence in this case. Your husband hasn't heard it,  
16 your wife hasn't heard it, whoever you live with, your  
17 friends, or whoever you are going to see and speak to  
18 tonight hasn't heard it; and it would be absolutely an  
19 injustice, to say nothing of a violation of the instructions  
20 of this Court, to talk about the case with anybody.

21 So I will be on hand at 9:30 tomorrow morning,  
22 although I will not be there unless you require my  
23 presence.

24 Thank you very much. Good night.

25 I will see you in the morning, gentlemen.

1839

1 gwlmm 11

2 I would suggest counsel take all the exhibits  
3 down to 518.

4 MR. WILSON: I will hand the exhibits to the  
5 clerk, if that is permissible. She will have to handle  
6 the notes, in any event.

7 THE COURT: Whatever you want to do.

8 (Adjournment to 9:30 a.m., June 18th,  
9 1975.)

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1 gwlm 12

2 UNITED STATES OF AMERICA

3 -against-

75 Cr. 208

4 GEORGE GALGANO and VICTOR LEO,  
5 a/k/a VICTOR BIANCO

6 June 18, 1975  
2:05 p.m.

7 (Jury not present.)

8 THE COURT: It's about five after two, and I have  
9 to proceed, since I have another case on trial, with a jury,  
10 and the United States Attorney isn't here; but, I believe  
11 these matters can be dealt with even though he is not.

12 The first note that I have received, which I am  
13 marking as a Court exhibit states:

14 "Could you clarify 'aiding and abetting' and can  
15 we have a copy of Counts 1 and 2?"

16 ((Notes from jury marked Court Exhibits 5 and

17 6.)

18 The second note is from Ms. Diana Mazemoff, No. 11,  
19 who says:

20 "I have a commitment to conduct a meeting this  
21 afternoon. There is no one to take my place. I have to  
22 leave at 2:30."

23 Obviously, I have to tell her she can't leave at  
24 2:30. That is the situation.

25 I propose to call the jury in and give them the  
definition of "aiding and abetting," and give them a copy

xxx

1 gwlm 13

2 of the indictment.

3 (Discussion off the record.)

4 THE COURT: I will remind them of the definition  
5 of "aiding and abetting" that I gave in my charge yesterday.  
6 I will ask whether that answers any questions that they  
7 have. If they indicate it does not answer any questions  
8 that they have, I will ask them what are their other ques-  
9 tions; and if they refer to Mr. Grande, I will consider the  
10 question at that time. I prefer not doing anything affirm-  
11 ative about it without the U. S. Attorney being here.

12 MR. WARBURGH: May I reserve my right to make a  
13 statement when he gets here?

14 MR. KREINCES: For the record, Mr. Warburgh and I  
15 would like to renew our request on that.

16 (Mr. Potter arrives.)

17 THE COURT: Mr. Potter, we received two notes:

18 One which asks for me to clarify the charge on  
19 aiding and abetting, and asks for a copy of Counts 1 and  
20 2.

21 The other, which is from Juror No. 11, saying,

22 "I have a commitment to conduct a meeting this  
23 afternoon. There is no one who can take my place. I must  
24 leave at 2:30," which I will have to advise her is impossible  
25 under the circumstances.



1842

1 gwlm 14

2 Counsel have asked me whether I would clarify  
3 the charge with regard to "aiding and abetting" as to  
4 David Grande. I have said I will not do so except if,  
5 after asking whether my clarification has answered all  
6 their questions, they indicate to me it has not answered  
7 all their questions, in which case I will ask them what  
8 further questions they have.

9 MR. KREINCES: May the record reflect both counsel  
10 have requested the Court?

11 THE COURT: Yes.

12 Bring in the jury.

13 (Jury enters the courtroom.)

14 THE COURT: Good afternoon, ladies and gentlemen.  
15 Please be seated.

16 I take it that even though the lights aren't there,  
17 you will be able to understand me. Can you hear me all  
18 right? I am not used to being in a normal-size courtroom.

19 I have two notes from you. The first I will  
20 have to deal with is Miss Mazemoff.

21 I am very unhappy about your note, and I don't  
22 think there is anything I can do about it except that we  
23 will be very glad to get in touch with anybody you want  
24 us to get in touch with. I wish I had been aware of this  
25 at an earlier time. I would have advised you --

1 gwlm 15

2 JUROR NO. 11: I made that appointment after  
3 last week when you finally announced probably Friday and at  
4 the most Monday.

5 THE COURT: I understand. I have been fooled --  
6 if that is the word to use -- just as much as the jury has.  
7 I was supposed to start the trial of another case, The  
8 one I did start this morning I was supposed to try on  
9 Monday, and I had to put that off and off.

10 It is simply impossible. If I had known of your  
11 problem, I would have forewarned you. In any event, if  
12 you can tell the clerk who she can telephone, she will  
13 telephone her immediately and tell her what happened.  
14 I will telephone her myself, if you wish.

15 JUROR NO. 11: There is nothing. It is a meet-  
16 ing where people have been invited in advance, and people  
17 will show up and they will have to be sent home.

18 THE COURT: I am aware of that, and I can't tell  
19 you how much I regret it. I will do everything possible  
20 to mend your fences for you.

21 Do you want to tell us now so we won't interrupt  
22 the proceedings?

23 JUROR NO. 11: Children's Services, and the  
24 number is 869-8940.

25 THE COURT: Is there anybody in particular we



1 gwlw 16

2 should speak to?

3 JUROR NO. 11: The thing is, the director, who  
4 was supposed to be involved, will not be there until 4:00  
5 o'clock.

6 THE COURT: Shall I ask for the director's  
7 secretary?

8 JUROR NO. 11: You can leave a message, yes.  
9 The meeting itself is not until 6:00 o'clock. I have an  
10 appointment with the director at 5:00, but I have prepara-  
11 tions to do. It's possible, I suppose, that I could get  
12 there. I don't know what to say to them.

13 THE COURT: Who would you speak to if you were  
14 going to telephone?

15 JUROR NO. 11: The director.

16 THE COURT: Shall we phone at 4:00, then?

17 JUROR NO. 11: Yes.

18 THE COURT: Who would that be?

19 JUROR NO. 11: Mrs. Smith.

20 THE COURT: On the other note which says;

21 "Could you clarify "aiding and abetting," and  
22 can we have a copy of Counts 1 and 2?"

23 Let me say, I am having a photocopy made of the  
24 entire indictment, and I will send it in to you by the  
25 marshal as soon as a copy has been made. We only have the

1 gwlm 17

2 original down here and I don't want to take a chance on  
3 the original getting lost or marked in any way.

4 As far as "aiding and abetting" is concerned, I  
5 will read you my charge again and then I will see if it  
6 answers all your questions; and if it doesn't answer your  
7 question, then you can ask specific, further questions.

8 I told you that in addition to relying on the  
9 earlier Acts of Congress, which I had mentioned, the Govern-  
10 ment is also relying on Title 18, United States Code, 62,  
11 which says that:

12 Whoever commits an offense against the United  
13 States, or whoever aids and abets in doing so, is punish-  
14 able as if he were a principal.

15 And I went on to say that it is not only a crime  
16 to commit a crime, but it is also a crime to aid or induce  
17 another person to commit a crime.

18 I then went on to say that in order to find that  
19 a defendant had aided and abetted another person in the  
20 commission of the crime, you must find that the aider or  
21 abettor, beyond a reasonable doubt, associated himself with  
22 the crime or criminal venture; that he participated in it  
23 as something which he wished to bring about or that he  
24 sought by his action to make the crime succeed.

25 And I said that to find a defendant guilty of



1 gwlm 13

2 aiding and abetting, you must, of course, find something  
3 more than mere knowledge on his part that a crime is being  
4 committed, for a mere spectator at a crime is not a  
5 participant. For example, if you were walking along the  
6 street and you saw somebody assaulting somebody else, you  
7 would not be an aider and abettor merely because you were  
8 present and witnessed what was happening.

9 On the other hand, if you were with another person  
10 and you saw somebody that you would like to have assaulted  
11 yourself and you said to the person that you were with,  
12 "Go ahead and hit him," and stood by and encouraged and  
13 cheered him on, so to speak, you could be guilty of aiding  
14 and abetting.

15 I want to make that distinction.

16 But in order to convict as an aider or abettor,  
17 it is not necessary that you find that the defendant himself  
18 actually did all the acts.

19 In this case, for example, you don't need to  
20 find that both defendants threatened. You could find  
21 that one threatened and that another urged him to do so,  
22 paid him to do so. I am saying if you infer such things,  
23 you could find that there was aiding and abetting.

24 If a defendant caused an act to be done which,  
25 if directly performed by him, would be an offense against

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1 gwlm 19

2 the United States if he had done it himself, then he would  
3 be guilty as an aider and abettor.

4 Does the repetition of those instructions, plus  
5 what else I have said, answer the questions that you have  
6 in your mind?

7 JUROR NO. 7: Yes.

8 THE COURT: Thank you very much, ladies and  
9 gentlemen.

10 I am going to ask you before you go back, Mr.  
11 Ellis, have -- there are at least two and maybe three  
12 verdicts that you will have to reach. At least two are on  
13 Count 1 and maybe the third would be on Count 2. Have  
14 you reached a verdict as to either of the defendants on  
15 Count 1? By that, I want to know whether the jury has  
16 voted and has unanimously agreed as to a verdict on either  
17 defendant on Count 1. Just say yes or no.

18 THE FOREMAN: No.

19 MR. KREINCES: May we have a side bar for a  
20 moment?

21 THE COURT: Yes.

22 (At the side bar.)

23 MR. KREINCES: I am concerned a little bit about  
24 your example, your Honor, in indicating to them they could  
25 infer if one urged or one paid. Is it possible to give



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1 gwlm 20

2 another example?

3 THE COURT: What would you like me to give?

4 MR. KREINCES: I hadn't really thought of an  
5 example. Again, a mere spectator at a crime is not a  
6 participant.

7 THE COURT: I will remind them of that again,  
8 yes.

9 (In open court.)

10 THE COURT: Ladies and gentlemen, there are two  
11 points:

12 First, I remind you, although it seems to me  
13 you should know it by now, that merely being a spectator  
14 at a crime does not, of course, make anybody guilty of  
15 anything.

16 The second is that, although I gave you certain  
17 examples, I did not mean to infer anything one way or  
18 another. I was just trying to define things for you.  
19 It's for you to decide whether either of the defendants  
20 has aided or abetted the other in this case.

21 Thank you very much. Please continue your  
22 deliberations.

23 (At 2:20 p.m., the jury retired to further  
24 deliberate upon a verdict.)

25 (At 3:00 p.m., the jury returned to the courtroom.)

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## SHERIFF'S OFFICE

Westchester County

White Plains, N. Y.

10:38

Sheriff

PAPER EX

No.

95741

DATE 11/18/70 ADDRESS

N.R.

Calgano Realty Corp PLAINTIFF

G. Zaffino VS.

Sims Inc.

DEFENDANT

ATTY Johnston Castiglia +

Lanzetta

DEPUTY  
SHERIFF

Olmsted

229 Harrison Ave  
Harrison

AMOUNT	INTEREST	FEES	TOTAL
10,632.67		2.50	
5,473.60	118.48	302.12	6347.13
5,924.03			
REPORT (5232A)			

N. B. W.

New Rochelle

11/19/70 Mrs. Deofuto

11/24/70 Rev. N. D. W. Church  
Cashier's check

COI 6042.51  
 PDCC 302.12  
 LEVY 2.50  
 6347.13

Satisfied



## SHERIFF'S OFFICE

WESTCHESTER COUNTY

WHITE PLAINS, N. Y.

## DEPUTY'S REPORT

Number

EX 93741

Deputy Sheriff

Olinsted

Date

11/24

1970

## STATEMENT:

## ACTION

Galvan Realty Corp

H. Zaffino &amp; Sons

Anthony Costello

M. B. K.  
Cashier's Check

5011

6042.51

PD60

302.12

1544

2.50

Total

6347.13

At the time of the preparation of this brief and appendix, it was realized that Appellant did not have Exhibit "Y" in his possession, however, true copies of that exhibit shall be delivered to the Clerk of the Court prior to argument of this appeal.



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The Legal Aid Society  
Federal Defense Service Unit

